Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

BLANCA GONZALEZ and MIGUEL MORENO,

Petitioners,

vs.

JOAN R. GALLO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a civil injunction against a public nuisance may constitutionally forbid an individual defendant from "standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant," or with any "known" member of a designated youth gang?

2. Whether such an injunction may constitutionally forbid an individual defendant from "in any manner confronting, intimidating, [or] annoying," "any residents or patrons, or visitors to" a city subdivision "or any other persons who are known to have complained about gang activities"?

3. Whether such an injunction may constitutionally bind an individual defendant on the basis of identification with a youth gang when there is no showing that the individual is likely to engage in concerted gang activity or intends to further the group's unlawful objectives?

LIST OF PARTIES

The Respondent in the court below was Joan R. Gallo, City Attorney of San Jose, California. The Appellants who contested the preliminary injunction in the court below were: Carlos Acuna, Jose Bravo, Eberardo Cervantes, Martin Davila, Blanca Gonzalez, Jorge Gonzalez, Juan Pineda Hernandez, Miguel Lopez, Miguel Moreno, Flavio Quinonez, and Rafael Ruiz. Only Blanca Gonzalez and Miguel Moreno join in this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Blanca Gonzalez and Miguel Moreno respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of California entered on January 30, 1997.

OPINIONS BELOW

The opinion of the California Supreme Court is reported as *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 60 Cal. Rptr. 277, 929 P.2d 596 (1997). It is reprinted in the Appendix. App. 1. The opinion of the California Court of Appeal for the Sixth Appellate District is not reported. It is reprinted in the Appendix. App. 85. The oral decision of the California Superior Court for the County of Santa Clara is not unreported. It is reprinted in the Appendix. App. 124.

JURISDICTION

Jurisdiction to review the final judgment of the Supreme Court of California entered on January 30, 1997, is conferred by 28 U.S.C. § 1257 in that petitioners raised federal constitutional challenges to the civil injunction at issue in all of the courts below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Civil Code section 3479 (Deering's 1997):

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street or highway, is a nuisance.

California Civil Code section 3480 (Deering's 1997):

> A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

California Code of Civil Procedure section 731, provides in relevant part:

> . . . . A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists. . . .

STATEMENT OF THE CASE

This petition challenges a decision of the Supreme Court of California upholding a preliminary injunction against persons identified by the City of San Jose as members of two youth gangs.[1] The injunction prohibits 24 enumerated categories of expression and conduct and multiple subcategories.

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[1] Violation of an injunction in California is punishable as civil contempt, with a maximum sentence of five days in jail and/or $1,000 fine (Cal. Code of Civil Procedure § 1209, subdivision 5; § 1218, subdivision (a)), or it is punishable as criminal contempt, with a maximum sentence of six months and/or a fine of $ 1,000. Cal. Pen. Code § 19; § 166, subdivision (4).

Petitioners Blanca Gonzalez and Miguel Moreno challenge two of the categories of prohibited activity because they are not narrowly tailored and because they are unconstitutionally vague. They further maintain that the California courts below linked them to the injunction on the basis of mere gang membership without a showing that they shared the unlawful aims of the gangs, or that they would engage in activity constituting the nuisance. In the case of Blanca Gonzalez the California Supreme Court authorized an injunction without any showing that she had engaged in or is likely to engage in any criminal conduct. She has been enjoined solely for admitting gang membership and wearing gang colors. In the case of Miguel Moreno, the Court authorized an injunction on a single showing that on one isolated occasion he was accused of selling $10 worth of "weed" to someone and that he, too, admitted gang membership and wore gang clothing (a Los Angeles Raiders hat and shirt).

This case was brought by Respondent Joan R. Gallo, the City Attorney of San Jose, California, on February 26, 1993, pursuant to Cal. Code of Civil Procedure § 731, seeking injunctive relief against a public nuisance. Cal. Civ. Code §§ 3479, 3480. Respondent filed a complaint in the name of the People of California, seeking injunctive relief against 38 named defendants and 100 unnamed Doe defendants. State Court Appendix in Lieu of Clerk's Transcript at 1.[2] The Complaint sought to enjoin conduct, expression, and associational activities on the ground that

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[2] Throughout this petition, references to the State Court Appendix in Lieu of Clerk's Transcript will be designated as "State Court App. ___."

the defendants were involved with two street gangs identified by the San Jose Police Department as Varrio Sureno Town or Varrio Sureno Treces ("VST") and Varrio Sureno Locos ("VSL"). The Complaint sought to enjoin not only conduct and activities constituting the nuisance, but a whole range of lawful conduct in a four block area of San Jose known as Rocksprings.

On the date the case was filed, the Superior Court issued an *ex parte* order to show cause, granted a temporary restraining order, and set the case for further hearing. State Court App. at 27a-j. The hearing occurred on March 10, 1993, when a preliminary injunction issued. Subsequently, six defendants moved to vacate the preliminary injunction entered against them. State Court App. 155. These six defendants, plus an additional five – all young Latino men and women who the City alleges are gang members – appeared in the superior court. Petitioners were among them. State Court App. at 155-56. They all opposed the issuance of injunctive relief on the grounds that it would impose guilt by association without satisfying federal constitutional standards, *id.* at 184-202, and that the terms of the order violated freedom of association and were void-for-vagueness. *Id.* at 214-225. On June 28, 1993 the Superior Court granted a further injunction and denied the motion to vacate.

The injunction was based solely upon presentation of declarations to the Superior Court. The core of the City's initial evidence rested on Sgt. Richard Saito's description of 403 criminal incident reports from Rocksprings during a twelve month period ending in February 1993. State Court App. 75-76. The City claimed these incident reports established a pervasive pattern of criminal gang activity,

which caused the public nuisance for which VST and VSL are responsible. However, Sgt. Saito admitted in his declaration that fully 86% of the reports clearly *do not* indicate that they are gang-related; only 12% of those reports are believed by the City to be "gang-related" and 2% were deemed to be "possibly gang-related." State Court App. 75-76. In absolute numbers, 48 out of the 403 incidents during the one-year period were allegedly "gang-related," and eight incidents were "possibly gang-related."

What little is known by respondent about the Sureno street gangs is that, unlike organized crime, these gangs are unstructured, "loosely based and informal," and "very fluid." State Court App. 694-96 (Niehoff Decl. ¶ 12, 16). There is no evidence that gang members benefit from or are even aware of the activities of other members. One of the City's gang experts, Officer Niehoff, admitted that "a Sureno gang member in San Jose can be loosely tied to a specific gang and still conduct business without having to give up a percentage of the profits to anyone." *Id.* at 700. Officer Niehoff also admitted that the VST gang has "no structural hierarchy," and that, as the gang "grew in size, many of its members did not know one another." *Id.* at 696.

To validate individual gang members, the San Jose Police Department applies its criteria for gang membership to police records, typically field interview cards ("FI Cards"). The criteria unilaterally applied by the police without judicial oversight are extremely broad and subjective. For example, an individual could and would be identified as a gang member if he or she was seen on just

one occasion wearing clothing indicative of gang membership, such as a blue jean jacket (State Court App. 681), cut-off sweat pants (*id.* at 729), "baggy" pants (*id.* at 620, 729), any clothing associated with the Los Angeles Raiders (*id.* at 625), or white, blue, gray, black, khaki or any other "neutral" colored item. (*id.* at 620, 625, 637, 662, 736.)

As to Petitioner Blanca Gonzalez, police officer Michael Lloyd submitted a declaration to the Superior Court stating:

> On May 20, 1992, while assigned to [Narcotics Enforcement Team], I made a vehicle stop in the area of Crucero and Tami Lee in San Jose. There was a young, hispanic female driver and two young, hispanic female passengers in the car. The driver identified herself as Blanca Gonzales [sic]. Ms. Gonzales [sic] was wearing a black top and black jeans. One of the female passengers was wearing a blue tank top and gray sweat pants. Their clothing was consistent with members of the Sureno criminal street gangs, because of the blue, black and gray clothing. Blue is the trademark color of Surenos, which also favor black, gray, white and neutral colors, and disfavor the color red, which is associated with rival Nortenos. The driver, Blanca Gonzales [sic], had been cruising in the area, circling up and down the street repeatedly. This caused me concern, because at the time there was a lot of open conflict in the area between members of rival Norteno and Sureno criminal street gangs. . . .
>
> I asked the three women if they claimed gang membership. [T]hey told me they did. Blanca

> Gonzales [sic] told me she belonged to "VST," and "VCT", also know as Varrio Colonio Treces.

See App. 131; State Court App. at 637. The only other evidence pertaining to petitioner Gonzalez is contained in the declaration of police officer Dave Storton:

> On October 31, 1992, at around 12:30 p.m., I was on foot patrol in "Rocksprings" when a car with two (2) young hispanic women drove up to the address at 649 Nordale. They waited outside that location, and they started up a conversation with me. One of the young women identified herself to me as Blanca Gonzalez. They told me that they did not live in "Rocksprings." I asked them if they belonged to a gang. They both responded that they were members of the "VSL" gang. I filled out a field interview card on both of them, documenting this information,. . . .

App. 140-41; State Court App. at 764.

As for petitioner Miguel Moreno, whose girlfriend and baby live on Nordale Avenue in Rocksprings, and whose cousin lives in Rocksprings, App. 145, State Court App. at 255, he was seen on August 28, 1992, "wearing a black 'Raiders' shirt and hat." App. 137, State Court App. at 760. On that occasion he told a police officer he was a Sureno. Later on October 13, 1992, he was suspected of having sold $10 worth of "weed" and being truant from school, while in Rocksprings. App.144; State Court App. at 755-56.

The injunction forbids, petitioners from among other things,

> (a) Standing, sitting, walking, driving, gathering or appearing anywhere in public view with

> any other defendant herein, or with any other known "VST" (Varrio Sureno Town or Varrio Sureno Treces), or "VSL" (Varrio Sureno Locos) member;. . . .
>
> (i) Approaching vehicles, engaging in conversation, or otherwise communicating with the occupants of any vehicle or doing anything to obstruct or delay the free flow of vehicular or pedestrian traffic;. . . .
>
> (k) In any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings', or any other persons who are known to have complained about gang activities,. . . .
>
> (n) Using or possessing pagers or beepers in any public place;. . . .
>
> (s) Climbing any tree, wall, or fence, or passing through any wall or fence by using tunnels or other holes in such structures;. . . .
>
> (v) Using words, phrases, physical gestures, or symbols commonly known as hand signs or engaging in other forms of communication which describe or refer to the gang known as "VST" or "VSL" as described in this Complaint [sic] or any of the accompanying pleadings or declarations;. . . .
>
> (w) Wearing clothing which bears the name or letters of the gang known as 'VST" or "VSL';. . . .

App. 116; State Court App. 836-840. The Superior Court's order provided that the injunction would expire in one year. However, on June 24, 1994, the Court modified the

preliminary injunction, extending its prohibitions indefinitely until a permanent injunction is either granted or denied. App. 122.

Defendants, including petitioners, appealed to the California Court of Appeal, Sixth Appellate District, which sits in San Jose, challenging the breadth and vagueness of provisions of the injunction, including paragraphs (a) and (k), and also contending that there was a constitutionally insufficient nexus between provisions of the injunction and several defendants, including petitioner Gonzalez and Moreno because respondents had failed to show "active" gang membership, that is, an intention to further any unlawful goals of the gangs.

Recognizing that "even membership in an organization which advocates or engages in illegal activity is not, by itself, grounds for imposition of punishment," (App. 112), and obviously concerned about the expansive use of the Superior Court's equitable power, a unanimous three judge panel, in an opinion by Associate Justice Franklin Elia, modified the injunction by vacating those portions which are not legally or constitutionally valid. The Court of Appeal also dismissed petitioner Gonzalez from the case, but not petitioner Moreno.

The Court of Appeal struck subdivision (a) of the injunction as vague and overbroad. The court stated that paragraph (a) raises arbitrary enforcement problems because respondent contended that "gang membership is fluid, uncertain, and often claimed by non-members for status reasons." Nonetheless, paragraph (a) forbids a defendant to congregate with a "known gang member." This, the court found to be, "a classic case of vagueness."

The Court of Appeal struck portions of paragraph (k) as unconstitutionally vague, because the terms "confront", "intimidate," and "annoy" fail to provide a standard of conduct for those whose activities are proscribed. Further, since the provision speaks of "persons" known to have complained about gang activities, without indicating how or whether a defendant is to be charged with this knowledge, this created the specter of arbitrary enforcement.

Citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 n. 67 (1982), the Court of Appeal held that even membership in an organization which advocates or engages in illegal activity is not, by itself, grounds for the imposition of punishment. "There must be some personal, individual participation in the illegal conduct for that conduct to be restrained . . . in order to comply with due process." App 112. Accordingly, the Court of Appeal found an inadequate basis for imposing civil liability on Blanca Gonzalez, stating "no showing has been made that she has done anything other than dress Sureno-style, claim gang membership, and be seen in Rocksprings." App. 113.

The California Supreme Court reversed, reinstating paragraphs (a) and (k) and holding that petitioner Blanca Gonzalez is properly subject to the injunction. In the majority opinion joined by three other justices, Associate Justice Janice R. Brown, focused extensively on the crime problem in Rocksprings, characterizing the area as a "war zone."

As to paragraph (a) of the injunction the Supreme Court held that there is no right to associate with fellow

gang members, App. 22, that the provision is not overbroad, because it only applies to the named defendants, App. 25, and that the provision is not vague because the trial court can impose a limiting construction when its hears contempt proceedings. App. 30.

Associate Justice Joyce Kennard dissented with respect to paragraph (a), stating that "Under the First and Fourteenth Amendments of the federal Constitution, a state may not make criminal the exercise of the right of assembly simply because its exercise may offend some people." App. 46. She cited to *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971). Further, she cited to *Madsen v. Women's Health Clinic*, 512 U.S. 753 (1994), for the proposition that injunctions touching First Amendment rights must be couched in the narrowest terms necessary to achieve the pinpointed objective. Associate Justice Stanley Mosk also dissented from the Court's opinion upholding paragraph (a), on the ground that the paragraph is vague and goes further than necessary to protect the lawful rights of the parties.

As to paragraph (k) the Supreme Court did not directly address the use of the term "annoy," but held the paragraph was not vague in "context." App. 38. Justice Mosk dissented as to those portions of paragraph (k) that are the subject of this petition.

As to petitioners, the California Supreme Court majority relied on *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287 (1941) and *Madsen*, holding that each of the defendants could be held to the provisions of the injunction: "individualized proof

is not a condition to the entry of preliminary relief based on a showing that it is the gang, acting through its individual members, that is responsible for the conditions prevailing in Rocksprings." App. 43.

Associate Justice Ming Chin and Justice Mosk dissented from this portion of the majority opinion. Relying on *NAACP v. Claiborne Hardware Co.*, and *Madsen*, Justice Chin asserted that there must be a link between each defendant and the problem the injunction addresses: "The legal principle at issue is quite simple. The law requires some link between each defendant who is subject to an injunction and the problem the injunction addresses." App. 49. As Justice Chin recognized, "[w]hether a court can enjoin individuals based on group membership depends on the nature of the group and the implications of membership under the circumstances." App. 51. He went on to say:

> If one purpose or activity of the group is the creation of a public nuisance, a court may enjoin both the group and its members. But the Sureno street gangs at issue in this case have fluid membership, no organizational structure, and no express purpose except perhaps to compete with members of rival Norteno gangs. The fact that many Sureno gang members commit crimes in Rocksprings does not establish that the gangs have crime as a universal purpose, primary activity, or condition of membership. The Sureno gangs might have some subdivisions that are criminally inclined and others that are not. Obviously, courts cannot enjoin all Mexican

> Americans because some Mexican Americans contribute to the nuisance in Rocksprings.

App. 51-52.

In his dissent, Justice Mosk wrote that

> The majority would permit our cities to close off entire neighborhoods to Latino youths who have done nothing more than dress in blue or black clothing or associate with others who do so; they would authorize criminal penalties for ordinary, non-disruptive acts of walking or driving through a residential neighborhood with a relative or friend. In my view such a blunderbuss approach amounts to both bad law and bad policy.

App. 83.

This Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

In recent years "law by injunction" has become more common. The Court has taken up several recent cases in the context of anti-abortion protests. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. ___, 117 S.Ct. 855 (1997); *Madsen v. Women's Health Center, supra*. Members of the Court have questioned the scope and breadth of the civil injunctive power in particular instances, including the California Supreme Court's broad approval of injunctive powers. *Williams v. Planned Parenthood Shasta-Diablo, Inc.*, ___ U.S. ___, 117 S.Ct. 1285 (1997) (Scalia, J., dissenting from denial of certiorari).

Each challenge to law by injunction proceeds on the assumption that streets and sidewalks are public fora. *Schenck*, at 867; *Madsen, supra; see Frisby v. Schultz*, 487 U.S. 474, 480 (1988); *United States v. Grace*, 461 U.S. 171, 179 (1983); *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) ("[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.") Precision of regulation has been the touchstone when First Amendment rights are involved.

In this case, the California Supreme Court has expanded the use of the injunctive power beyond precedent and beyond recognition. By labelling personal conduct to be a public nuisance, and sweeping within its reach lawful and protected conduct by individuals who have committed nothing wrong, it has permitted local judges to devise local penal codes that allow the police to make arrests on city streets and sidewalks when persons congregate together or "annoy" other persons. In effect, the California Supreme Court has approved a regime in which a judge may banish persons from joining together in public view in certain neighborhoods by, in essence, imposing conditions of parole prophylactically before a crime is committed. The California Supreme Court has approved application of such injunctions to persons, such as petitioners, who have not engaged in conduct that itself constitutes a nuisance, but simply on the basis of the clothes they wear and their identification with a youth gang.

The respondent's approach from the outset of this case has been to lump as many criminal acts together as possible, attempt to link them to some members of two youth gangs in San Jose, and then seek and defend the

broadest conceivable injunction imaginable against as broad an array of individuals as possible, in the hope that somehow putting all this together will pass muster in the courts. However, in our society, one function of courts is to put the brakes on excessive governmental power.

Whatever can be said for the utility of the regime approved in California, it raises serious constitutional concerns that are addressed in this case. By giving a green light to such undiscriminating and broadly worded injunctions, the California Supreme Court has signalled its approval of law by decree, regardless of the effect this has on the right to assemble peaceably and the right to associate freely. By raising the specter of street gangs, the California Supreme Court has dispensed with the scrutiny that ordinarily protects innocent conduct from interference by courts and police authorities.

The California Supreme Court's approach is limitless. Doubtless it will be applied to other activity and conduct beside gangs in the future, because the nuisance injunction is so broad in what it enjoins and who is subject to its terms, that the nuisance injunction now provides a powerful and convenient tool for suppressing persons deemed to be undesirable. At the same time, such injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen*, 512 U.S. at 764.

The fact that the California Supreme Court recognized a general pervading sense of lawlessness in Rocksprings does not end the constitutional inquiry. For as the Court pointed out in *Schenck*, which was decided after this case was decided by the California Supreme Court,

even "extraordinary" conduct does not, and cannot abrogate the need to assure that no more rights are restricted than necessary. 117 S.Ct. at 866-869. Only when protected conduct is "enmeshed with contemporaneously violent conduct" may it be enjoined wholesale. *See Milk Wagon Drivers Union*, 312 U.S. at 292. "Episodic" or "sporadic" violent acts are not enough to shut down all lawful activity whatsoever. *Id.* at 295. In this sense the sweeping reliance on *Milk Wagon Drivers Union* by the California Supreme Court majority – that any restrictions are justified if the underlying situation is bad enough – has been undercut by the analysis in *Madsen* and *Schenck* that each restriction on otherwise protected activity must stand on its own in light of the record. Indeed, both the *Madsen* and *Schenck* opinions go to enormous lengths to parse out the violent and intimidating conduct at issue from that which is protected and to assure that no more is proscribed than necessary. The California Supreme Court, instead, has mischaracterized and misused the Court's decision in *Madsen* as a license to approve carte blanche group-based injunctions without requiring the traditional and constitutional showing of nexus between the persons and conduct enjoined and the nuisance to be abated.

This case therefore raises serious constitutional issues that deserve review by the Court. California's highest court has decided important issues of federal law that have not been, but should be settled by the Court, and has decided those issues in a manner that conflicts with relevant decisions of the Court.

1. The Court Should Grant Certiorari to Decide Whether an Injunction Forbidding a Person from Standing, Sitting, Walking, Driving, Gathering or Appearing Anywhere in Public View with any Other Defendant or Known Gang Member is Constitutionally Permissible.

Paragraph (a) of the injunction prohibits:

> "Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant herein, or with any other known "VST" (Varrio Surreno Town or Varrio Surreno Treces) or "VSL" (Varrio Surreno Locos) member;"

App. 117-118.

First, the injunction's prohibition applies without any requirement or condition that the defendant or his or her associates be involved in any illegal or even suspicious activity, and without any proof or finding that the prohibited associational acts have anything whatsoever to do with the asserted gang nuisance. *See Wright v. Georgia*, 373 U.S. 284, 293 (1963) ("[T]he possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right . . . to be present.").

The issue is starkly presented in the case of petitioner Gonzalez. All she was ever accused of doing is driving in a car, identifying herself as a gang member on two occasions, and wearing clothing consistent with membership in the Surreno gangs. Only once was she even in Rocksprings.

Petitioner Miguel Moreno has a girlfriend, baby and cousin in Rocksprings. All he did was wear a "Raiders" shirt and cap in Rocksprings. On another occasion he was accused of selling $10 worth of marijuana. Despite his family ties to the neighborhood he cannot be seen with another person who the police believe is a gang member.

Under standards set forth in *Madsen* this ban on public association in Rocksprings is more than "necessary to serve a significant governmental interest." 512 U.S. at 765; *Schenck v. Pro-Choice Network of Western New York*, ___ U.S. ___, 117 S.Ct. 855, 865 (1997).

Granted petitioners are not political protestors. But it is practically axiomatic that ordinary persons, like them, have as much right to use the sidewalks and streets as protestors. *See Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611 (1970); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1966). Petitioners' right to use the public streets and to associate with other persons *in public* is one of the hallmark's of a free society. This right implicates the First Amendment, as well as the right to freedom of movement. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).[3]

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[3] Indeed, petitioners need not engage in concerted intimate conduct with all other gang members to be protected by the constitution. They may loosely associate, without hierarchies, and structure, as a form of ongoing social intercourse. Even the California Supreme Court recognized as much. App. 20. "Indeed, as many observers have noted, gangs often serve effectively as surrogates for families that do not work especially well for some gang members." D. Monti, in S. Cummings and D. Monti, Gangs: The Origins and Impact of Contemporary Youth Gangs in the United States (1993) at p. 10. But the California

> The right to walk the streets, or to meet publicly or for no purpose at all – and to do so whenever one pleases – is an integral component of life in a free and ordered society. This right is rooted in the First Amendment's protection of freedom of expression and association, as well as . . . the Fifth Amendment's protection of fundamental liberty interests under the doctrine of substantive due process.

Waters v. Barry, 711 F.Supp. 1125, 1134 (D.D.C. 1989). *See also Coates v. City of Cincinnati, supra* (recognizing the First and Fourteenth Amendment rights to gather in public places for social as well as political purposes); *Sawyer v. Sundstrom*, 615 F.2d 311, 316-17 (5th Cir. 1980).[4]

Second, the provision is unconstitutionally vague. The paragraph prohibits Blanca Gonzalez and Miguel Moreno from, among other things, appearing in public with any "known" VST or VSL gang member. However, there are no prescribed standards for determining who falls within the category of "known" gang members. This is especially so in the context of this case in which the two youth gangs are fluid, without a hierarchy, and amorphous. The unconstitutional vagueness inherent in the terminology upheld by the California Supreme Court was condemned by the Court over fifty years ago in *Lanzetta*

Supreme Court held that such loose association is not constitutionally protected at all. *Ibid.*

[4] In *Sawyer v. Sundstrom*, 615 F.2d 311, 316-17 (5th Cir. 1980), the court held that punishing an individual "not for his own criminal acts, but rather for his act of being in a public place and associating with individuals whom he knows to be engaged in criminal activity," is an infringement of First Amendment Associational rights.

v. New Jersey 306 U.S. 451, 458 (1939), when it confronted a blunderbuss effort to combat gang activity. The Court held that the expression "known to be a member" of a gang is ambiguous. *See also Farber v. Rochford*, 407 F.Supp. 529, 532 (N.D. Ill. 1975) (citation omitted) ("Known by whom – the arresting officer, his superior or another officer who tells him, or neighbors or other civilians who tell the police[?]"). The vagueness is inherent in the terms "known" and "member." Known to whom?

The California Supreme Court believed the problem could be rectified because the concept of knowledge is fairly implied in the decree. But the court altogether ignored the manifest potential for arbitrary enforcement that comes from this paragraph. A police officer is now given the power to arrest Blanca Gonzalez or Miguel Moreno when the officer thinks she or he knows that they are associating in public view with a member of one of the two Sureno youth gangs. Although petitioners might have a defense to a conviction for contempt, *if* they do not in fact have such knowledge, they are nonetheless subject to arrest, jail, and prosecution whenever a police officer thinks they have such knowledge. If they are seen with others in Rocksprings, they are subject to arbitrary and discriminatory justice forbidden by due process. *Kolender v. Lawson*, 461 U.S. 352, 358-361 (1983).

Like the statute that was struck down by the Court in *Kolender*, after being given a limited construction by California courts, paragraph (a) of the injunction fails to provide guidance for what petitioners must do to avoid arrest if they are in the presence of others – other than steer clear of Rocksprings altogether. They are always subject to arrest if a police officer believes they know the

person with whom they are standing, sitting, walking, driving, gathering or appearing in public view is a gang member.

In a day and age when the Court has scrupulously attempted to delineate the outside limits on the scope of injunctive decrees when they potentially trench upon First Amendment freedoms, paragraph (a) is clearly overreaching and impermissibly vague. "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one." *International Longshoremen's Assn. v. Philadelphia Marine*, 389 U.S. 64, 76 (1967). The California Supreme Court's treatment of the provision deserves consideration by the Court.

2. The Court Should Grant Certiorari to Decide Whether an Injunction Forbidding a Person From In Any Manner Confronting, Intimidating, or Annoying Other Persons is Constitutionally Permissible.

In this court Petitioner does not challenge all of the provisions of paragraph (k) of the injunction. We urge the Court to review paragraph (k)'s prohibition against petitioners "[i]n any manner confronting, intimidating, [or] annoying" any residents or patrons or visitors to Rocksprings, or any persons known to have complained about gang activities. App. 119. Many of the same considerations applicable to paragraph (a) apply to this provision. We will not repeat them here.

Paragraph (k) of the injunction is also impermissibly vague on its own terms. What constitutes "confrontation"

"intimidation" and "annoyance" is not defined in the injunction. It is an inherently subjective concept solely within the eye of the beholder. In *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1970), the Court struck down an ordinance prohibiting conduct which was "annoying to persons passing by," on the grounds that the word "annoying" was too vague a concept upon which to impose liability. As the Court pointed out in language that is particularly relevant to this case:

> The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.

402 U.S. at 615. *See also Boos v. Barry*, 488 U.S. 312, 322 (1988) (a standard that is "so inherently subjective that it would be inconsistent with 'our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience' " is unconstitutional.).

The California Supreme Court held that the terms are not vague because they must be considered in "context" and because the multiple declarations filed in support of

the injunction "leave little doubt as to what kind of conduct the decree seeks to enjoin." But the California Supreme Court thoroughly ignored and did not address the potential for arbitrary enforcement inherent in the terms used in the injunction.

Looking to "context" and the declarations filed in support of the injunction, Blanca Gonzalez's conduct is apparently sufficient to be confrontational, intimidating, and annoying, as is the conduct of Miguel Moreno. Since there is no limit set by the injunction itself, or the California Supreme Court, petitioners are potentially subject to arrest if a resident, patron, visitor, or someone in Rocksprings "known" to have complained about gang activity finds their very presence confrontational, intimidating, or annoying.

Only a decade ago, the Court repeated the century-old principle that " '[i]t would be certainly dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.' " *Houston v. Hill*, 482 U.S. 451, 466 (1987), *quoting, United States v. Reese*, 92 U.S. 214 (1876). Indeed, as the *Houston* opinion points out, the Court has repeatedly invalidated laws that give the police the power to arrest for words or conduct that annoy or offend. *Id.* at 465.

The openended invitation to arbitrary enforcement should be reviewed by the Court.

3. The Court Should Grant Certiorari to Decide What Nexus is Necessary to Bind an Individual to an Injunction Based on Group Affiliation.

As the Court has held, "an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a 'cognizable danger of recurrent violation.' " *Madsen v. Women's Health Center*, 512 U.S. 766, n. 3 (1994). This principle takes on constitutional dimension under both the First Amendment and Due Process Clause when an individual is found to be legally culpable without a nexus between the individual and the acts to be enjoined. Under our system of justice, guilt by association is anathema. Collective responsibility should be limited to instances in which there is personal participation or a concerted design to accomplish a wrongful objective. *Compare, Rizzo v. Goode*, 423 U.S. 362, 373-76 (1975) (police accused of engaging in wholesale acts of brutality, but liability of the entire department could not be based upon a sampling of incidents); Fed. R. Civ. P. 65(d).

The California Supreme Court held that the two gangs could have been enjoined and therefore all of their members could too.[5] Even if the first part of the proposition were true, the second does not necessarily follow. It has long been established as a First Amendment matter that mere membership in a group is an insufficient basis upon which to enjoin or hold individual members liable.

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[5] Compare Federal Rule of Civil Procedure 65(d) which requires an agency relationship or at least "active" participation with culpable parties.

This principle was affirmed in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 (1982), where the Court held, in the context of determining liability for damages resulting from a violent boycott, that "[t]he First Amendment . . . restricts the ability of the State to impose liability on an individual solely because of his association with another."

> Civil Liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.

Id. at 920. The Court cited a long line of cases in support of this well-established proposition. *See id.* at 919-920. For instance, in *Scales v. United States*, 367 U.S. 203 (1961), the Court held that to punish association with a group that has both legal and illegal aims, like the VST/VSL gang, there must be "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.' " In *Healy v. James*, 408 U.S. 169 (1972), the Court held that a student group could not be denied recognition at a state-supported college merely because of its affiliation with a violent organization. The Court noted that it "has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." *Id.* at 185-86.

Further, as a matter of due process, guilt is personal. As the Court stated over thirty years ago, vicarious personal liability on the basis of mere membership is forbidden:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment. Membership, without more, in an organization engaged in illegal advocacy, it is now said, has not heretofore been recognized by this Court to be such a relationship.

Scales v. United States, 367 U.S. 203, 224-25 (1961). Proof of specific intent is the touchstone.

As Judge Kozinski recently wrote:

> "The state's argument smacks of guilt by association. Except in West Side Story, gang members do not move in lock-step formation. Gang movements are, in fact, often more chaotic than concerted. *See Jeffrey Mayer*, Individual Moral Responsibility and Criminalization of Youth Gangs, 28 Wake Forest L. Rev. 943, 949-50 (1993) (describing most gangs as 'disorganized' and decrying 'efforts to prosecute . . . gang members on the basis of social ties,' as opposed to 'traditional legal principles,' as a 'panic response'). Membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to

> establish aiding and abetting. To hold otherwise would invite absurd results.

Mitchell v. Prunty, 107 F.3d 1337, 1341-42 (9th Cir. 1997).

Even if the gangs were not constitutionally protected organizations, that does not absolve respondent of proving individual culpability. The Court has held that the United States Jaycees are not sufficiently intimate for First Amendment associational purposes. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Nonetheless, personal liability for unlawful acts committed by the Jaycees (such as violating liquor laws or tax laws) could not be imposed upon each and every member of the Jaycees; liability could only be imposed on those members responsible for the conduct – *i.e.*, those who participated, intended to participate, or shared the specific intent to further the unlawful objectives. The same can be said for the Aryan Brotherhood prison gang considered in *Dawson v. Delaware*, 503 U.S. 159 (1992). The beliefs and activities of members of the gang in California could not be held against a member in Delaware. *Id.* at 165. The same is true here.

The California Supreme Court's rationale for linking petitioners to the injunction creates an important precedent which alters the landscape of personal liability. The Court's reliance on *Madsen* and *Milk Wagon Drivers Union* sets up a dangerous tension with *Claiborne Hardware* and *Scales*. Both *Madsen* and *Milk Wagon Drivers Union* address what could be enjoined, rather than who could be enjoined.

Most importantly, the concerted unlawful action enjoined in both *Madsen* and *Milk Wagon Drivers Union* was such that persons participating in such action under the circumstances described in those opinions must necessarily have had sufficient knowledge to share the unlawful aims of the group.

Respondent's evidence is plainly insufficient to link petitioners to the nuisance.[6] The fundamental principle of our constitutional jurisprudence, that guilt is personal and may not be based on association alone, applies whether the organization at issue is the NAACP (*Claiborne Hardware*), the Communist Party (*Scales*), the Students for a Democratic Society (*Healy*), a racketeering enterprise (*see United States v. Marino*, 648 F.2d 367, 380 (5th Cir. 1981)), *cert. denied*, 456 U.S. 943 (1982)), or a gang (*Dawson*). It is irrelevant whether the organization has legal or illegal aims. Punishment for association must comply with constitutional due process standards. No

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[6] Petitioner recognizes that the Court does not ordinarily review the facts resolved by the lower courts. However, this principle is inapplicable to a case such as this one in which the question is raised whether constitutional principles have been improperly applied in a manner restricting protected rights. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 n. 50 (1982); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).

Moreover, the evidence linking Blanca Gonzalez to the nuisance is sparse and easily reviewed. It consists of portions of two police declarations, both of which have been included in the Appendix. The same is true with regard to Miguel Moreno. Finally, the lack of evidence is so shockingly negligible that the due process issues are starkly presented. *See Garner v. Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

decision of this Court has ever held otherwise. The irreducible minimum of Due Process is personal guilt, and the California Supreme Court was wrong in dispensing with this bedrock principle.

The Court should grant certiorari to resolve these important principles in the context of gang abatement injunctions.

CONCLUSION

The petition should be granted.

Dated: April 30, 1997

Respectfully submitted,

AMITAI SCHWARTZ
Counsel of Record

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IN THE SUPREME COURT OF CALIFORNIA

PEOPLE ex rel. GALLO, Plaintiff and Respondent, v. CARLOS ACUNA et al., Defendants and Appellants.	S046980 Ct. App. 6 H011802 Santa Clara County Super. Ct. No. 729322 (Filed Jan. 30, 1997)

At the request of the City Attorney of the City of San Jose (hereafter the City), we granted review to resolve an array of challenges to two provisions of a preliminary injunction entered by the superior court against individual members of an alleged "criminal street gang." The underlying action was instituted under the provisions of sections 731 of the Code of Civil Procedure and 3480 of the Civil Code, the operative core of California's civil "public nuisance" statutes.

The 48 declarations submitted by the City in support of its plea for injunctive relief paint a graphic portrait of life in the community of Rocksprings. Rocksprings is an urban war zone. The four-square-block neighborhood, claimed as the turf of a gang variously known as Varrio Sureno Town, Varrio Sureno Treces (VST), or Varrio Sureno Locos (VSL), is an occupied territory. Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency – openly

drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents' cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire echoing in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. The community has become a staging area for gang-related violence and a dumping ground for the weapons and instrumentalities of crime once the deed is done. Area residents have had their garages used as urinals; their homes commandeered as escape routes; their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen canvas of gang graffiti.

The people of this community are prisoners in their own homes. Violence and the threat of violence are constant. Residents remain indoors, especially at night. They do not allow their children to play outside. Strangers wearing the wrong color clothing are at risk. Relatives and friends refuse to visit. The laundry rooms, the trash dumpsters, the residents' vehicles, and their parking spaces are used to deal and stash drugs. Verbal harassment, physical intimidation, threats of retaliation, and retaliation are the likely fate of anyone who complains of the gang's illegal activities or tells police where drugs may be hidden.

Among other allegations, the City's complaint asserted that the named defendants and others "[f]or

more than 12 months precedent to the date of [the] complaint, continuing up to the present time . . . [have] occupied [and] used the area commonly known as 'Rocksprings' . . . in such a manner so as to constitute a public nuisance . . . injurious to the health, indecent or offensive to the senses, [and] an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property by those persons living in the . . . neighborhood."

After alleging the usual requisites for equitable relief – the prospect of "great and irreparable injury" and the absence of "a plain, adequate and speedy remedy at law" – the complaint prayed for a broad and comprehensive injunction against defendants' alleged activities in Rocksprings. The superior court granted an ex parte temporary restraining order enjoining all 38 defendants named in the complaint and issued an order to show cause (OSC) why a preliminary injunction should not be entered.

Only five of the named defendants appeared in response to the OSC. Following a hearing, the superior court entered a preliminary injunction against the 33 defendants who had not appeared and continued the matter as to those 5 defendants who opposed entry of a preliminary injunction, leaving the temporary restraining order in force as to them. Eleven of the named defendants (the five who had originally appeared in opposition to the OSC, together with another six of the named defendants) moved to vacate the injunctions. After the matter was briefed and argued, the superior court entered a preliminary injunction. The multi-part decree, consisting of some 24 paragraphs, was the subject of an interlocutory appeal by these 11 defendants.

The Court of Appeal disagreed with the superior court, upholding only provisions of the preliminary injunction enjoining acts or conduct defined as crimes under specific provisions of the Penal Code. Although its premise is never clearly articulated, that ruling effectively limits the scope of permissible injunctive relief under California's public nuisance statutes to independently criminal conduct. The Court of Appeal also concluded many of the provisions of the preliminary injunction were void and unenforceable under either the First and Fifth Amendments to the federal Constitution as unconstitutionally vague or overbroad. Altogether, 15 of the 24 provisions of the trial court's preliminary injunction were partially or entirely invalidated. However, the City's petition only sought review of two provisions – paragraphs (a) and (k). We granted the City's petition and now reverse.

We consider first the scope of and conditions precedent to the exercise of the superior court's equitable jurisdiction to enjoin a public nuisance. We then assess defendants' challenges to paragraphs (a) and (k) of the superior court's preliminary injunction, challenges based on restraints inherent in the administration of equitable remedies, and those arising from constitutionally based limitations. Finally, we consider (and reject) defendants' arguments that the "STEP" Act[1] is the exclusive means of obtaining nuisance-based injunctive relief against a criminal street gang. We will conclude the two challenged provisions fall within the superior court's equitable

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[1] The "Street Terrorism Enforcement and Prevention Act." (Pen.Code, § 186.20 et seq.)

power to abate a public nuisance and neither runs afoul of rights secured to defendants by the federal Constitution.

I. Equitable Jurisdiction To Enjoin Public Nuisances

A. The Origin And Nature Of Actions To Enjoin Public Nuisances

Often the public interest in tranquillity, security, and protection is invoked only to be blithely dismissed, subordinated to the paramount right of the individual. In this case, however, the true nature of the trade-off becomes painfully obvious. Liberty unrestrained is an invitation to anarchy. Freedom and responsibility are joined at the hip. "Wise accommodation between liberty and order always has been, and ever will be, indispensable for a democratic society." (*Kovacs v. Cooper* (1948) 336 U.S. 77, 89 (conc. opn. of Frankfurter, J.).) There must be an irreducible minimum of reciprocity for civil society to function. "[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." (*Wisconsin v. Yoder* (1972) 406 U.S. 205, 215-216 [92 S.Ct. 1526, 1533].)

The state has not only a right to "maintain a decent society" (*Jacobellis v. Ohio* (1964) 378 U.S. 184, 199), but an obligation to do so. In the public nuisance context, the community's right to security and protection must be reconciled with the individual's right to expressive and associative freedom. Reconciliation begins with the acknowledgment that the interests of the community are

not invariably less important than the freedom of individuals. Indeed, the security and protection of the community is the bedrock on which the superstructure of individual liberty rests. From Montesquieu to Locke to Madison, the description of the pivotal compact remains unchanged: by entering society, individuals give up the unrestrained right to act as they think fit; in return, each has a positive right to society's protection. Montesquieu describes this civil liberty as "that tranquillity of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen." (Montesquieu, The Spirit of the Laws (U. Cambridge Press 1989) ch. 6, p. 157; and see Locke, Two Treatises on Government (U. Cambridge Press, student ed. 1988) §§ 122, 140, 211, 227; Madison, The Federalist No. 51 (Rossiter ed. 1961) pp. 324, 325.) As we explain, a principal office of the centuries old doctrine of the "public nuisance" has been the maintenance of public order – tranquillity, security and protection – when the criminal law proves inadequate.

There are few "forms of action" in the history of Anglo-American law with a pedigree older than suits seeking to restrain nuisances, whether public or private. Actions to abate private nuisances by injunction are the oldest of these apparent twins, which have almost nothing in common except the word "nuisance" itself. Unlike the private nuisance – tied to and designed to vindicate individual ownership interests in *land* – the "common" or *public* nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of *community* interests and, at least

in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century.

Originally, a public nuisance was an offense against the crown, prosecuted as a crime. The first known statute dealing with public nuisances – enacted in the 12th year of Richard II's reign – had as its subject the pollution of waters and ditches lying near settlements, and provided criminal liability for the offender.[2] The earliest public nuisance statute thus bore a feature that marks the entire field even today: public nuisances are offenses against, or interferences with, the exercise of *rights common to the public*. (See generally, Baker, An Introduction to English Legal History (3d ed. 1990) pp. 492-494.)

In this country, as in England, civil suits in equity to *enjoin* public nuisances at the instance of public law officers – typically a state's Attorney General – grew increasingly common during the course of the 19th century, a trend that was not without critics. (See, e.g., 2 Story's Equity Jurisprudence (14th ed. 1918) § 1250, p. 597 ["In the case of public nuisances properly so called an indictment lies to abate them and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction. (Fn. omitted.)"]; *Mugler v. Kansas* (1887) 123 U.S. 623, 672-673; cf. *State v. Ehrlick* (W. Va. 1909) 64 S.E. 935, 938 [" 'If a charge be of a criminal nature, or an offense against the public, and does not

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[2] "If anyone cast dung etc. into Ditches, Water etc. which are next to any City, Borough or Town, he who will may sue forth a writ directed unto the Mayor or Sheriff or Bayliff of such Town etc." (The Stat. of 12 Rich. II, 1389, ch. 13.)

touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right resting in equity. . . . ' Attorney General v. Insurance Co., 2 Johns. Ch. 378. . . . "].)

With the publication of the Restatement Second of Torts in 1965, the law of public nuisances had crystallized to such an extent that its features could be clearly delineated. Section 821B of Restatement Second of Torts identifies five general categories of "public rights," the unreasonable interference with which may constitute a public nuisance: "the public health, the public safety, the public peace, the public comfort or the public convenience." (Rest.2d Torts, § 821B, subd. (2)(a).) A "public right," according to the Restatement Second, "is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured." (*Id.*, com. g, p. 92.)

In California, the early common law categories of public nuisance, codified in 1872 and still applicable, define anything that is "injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway," as a nuisance. (Civ.Code, § 3479.) Civil Code sections 3480 and 3481 divide the class of nuisances into public and private. A public nuisance is one which "affects at the same time

an entire community or neighborhood, or any considerable number of persons." (Civ.Code, § 3480.) Rounding out the taxonomy of the Civil Code, section 3491 provides that "the remedies against a public nuisance are: [¶] 1. Indictment or information; [¶] 2. A civil action; or, [¶] 3. Abatement."

Section 370 of the Penal Code mirrors these civil provisions, combining the characteristics of nuisances generally with a distinctly public quality: that a given activity "interfere with the comfortable enjoyment of life or property by an entire *community or neighborhood, or by any considerable number* of persons." (Pen.Code, § 370, italics added.) In *People* ex rel. *Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 49, we parsed these code provisions, remarking on "the substantial identity of definitions appearing in Penal Code section 370 and 371, and Civil Code section 3479 and 3480. . . . " After quoting the text of section 370, we observed: "[T]he proscribed act may be anything which *alternatively* is injurious to health *or* is indecent, *or* offensive to the senses; the *result*[ ] of the act must interfere with the comfortable enjoyment of life or property; and those affected by the act may be an entire neighborhood or a considerable number of persons, and as amplified by Penal Code section 371 the extent of the annoyance or damage on the affected individuals may be unequal." (*People* ex rel. *Busch v. Projection Room Theater, supra,* 17 Cal.3d at p. 49, original italics deleted, new italics added.)

It is this *community* aspect of the public nuisance, reflected in the civil and criminal counterparts of the California code, that distinguishes it from its private cousin, and makes possible its use, by means of the

equitable injunction, to protect the quality of organized social life. Of course, not every interference with collective social interests constitutes a public nuisance. To qualify, and thus be enjoinable, the interference must be both *substantial* and *unreasonable*. We recently discussed these two requirements, albeit in the context of private nuisances, in *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893.[3] Relying on the Restatement Second of Torts, we observed that " 'Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyance to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together.' " (13 Cal.4th at p. 937, quoting Rest.2d Torts, § 822, com. g, p. 112.)

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[3] As the editors of the second Restatement note, at common law the public nuisance involved "an interference with a right common to the general public. Little more than this in the way of a standard for determining what kinds of interferences constitute the crime of public nuisance was to be found in the cases." (Rest.2d Torts, § 821B, com. e, p. 89.) The development of the private nuisance tort action, however, "led to the application in public nuisance cases . . . of an analysis substantially similar to that employed in the tort action for private nuisance." (*Ibid.*) By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance. (See *id.*, at pp. 89-91.)

The Restatement Second formulates the requirement of substantiality as proof of "significant harm," defined as a "real and appreciable invasion of the plaintiff's interests," one that is "definitely offensive, seriously annoying or intolerable." (Rest.2d Torts, § 821F, coms. c & d, pp. 105-106.) The measure is an objective one: "If normal persons in that locality would not be substantially annoyed or disturbed by the situation then the invasion is not a significant one. . . . " (*Id.*, com. d, p. 106.) The unreasonableness of a given interference represents a judgment reached by comparing the social utility of an activity against the gravity of the harm it inflicts, taking into account a handful of relevant factors. (See Rest.2d Torts, §§ 826-831; *San Diego Gas & Electric Co. v. Superior Court, supra,* 13 Cal.4th at p. 938.) Here again, the standard is an objective one: "[T]he question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' " (*San Diego Gas & Electric Co. v. Superior Court, supra,* 13 Cal.4th at p. 938, quoting Rest.2d Torts, § 826, com. c, p. 121.)

B. Expansion And Contraction Of "Criminal Equity"

With the legitimacy of equitable relief to control public nuisances well established, American courts began to enlarge the jurisdiction of what has been called by some "criminal equity" and, by others, "government by injunction." (See Mack, *The Revival of Criminal Equity* (1903) 16 Harv. L.Rev. 389, 397; Fiss, Injunctions (1972) p. 580.) The

highwater mark of this trend may have been reached in *In re Debs* (1896) 158 U.S. 564, where a strike by employees at the Pullman car works in Chicago paralyzed much of the nation's rail transportation and, with it, national commerce. The strike was broken by the entry of a public nuisance injunction – the controversial "Pullman injunction."

Whatever its merit as a question of commerce clause jurisprudence (see 8 Fiss, History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910 (1993) pp. 58-72), and whatever its place in the history of American labor strife, Justice Brewer's opinion for the court in *In re Debs, supra,* 158 U.S. 564, reads like a primer on the first duty of government by consent – maintenance of the public order – and the utility of the public nuisance injunction in fulfilling that aspect of the social contract. Justice Brewer rested the power of the courts to issue such an injunction on the "obligations which [government] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare," a duty which the court's opinion said was "often of itself sufficient to give [the government] standing in court." (*Id.*, at p. 584.)

An end to this expansive trend, at least as it was reflected in the jurisprudence of this court, came with Chief Justice Gibson's opinion in *People v. Lim* (1941) 18 Cal.2d 872. Although we upheld the complaint as sufficient, our opinion in *People v. Lim, supra,* 18 Cal.2d 872, articulated an important limitation on the scope of the government's power to exploit the public nuisance injunction as an adjunct of general legal policy. "[T]he tendency to utilize the equity injunction as a means of

enforcing public policy is a relatively recent development in the law," the Chief Justice wrote. (*Id.*, at p. 877.) "This development has resulted in a continuous expansion of the field of public nuisances in which equitable relief is available at the request of the state." (*Ibid.*)

After identifying a division among the authorities "as to whether the expansion of the field of public nuisances in which equity will grant injunctions must be accomplished by an act of the legislature," the *Lim* court came down firmly on the side of legislative supremacy. (*People v. Lim, supra,* 18 Cal.2d at p. 878.) "The courts of this state," we wrote, "have refused to sanction the granting of injunctions on behalf of the state merely by a judicial extension of the definition of 'public nuisance.' . . . [They have] refused to grant injunctions on behalf of the state *except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance.*" (*Id.*, at pp. 878-879, italics added.)

Reflected in the light of our holding in *People v. Lim, supra,* 18 Cal.2d 872, two features of California's public nuisance scheme stand out. First, subject to overriding constitutional limitations, the ultimate legal authority to declare a given act or condition a public nuisance rests with the Legislature; the courts lack power to extend the definition of the wrong or to grant equitable relief against conduct not reasonably within the ambit of the statutory definition of a public nuisance. This lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a "public nuisance." (See, e.g., *People v. Seccombe* (1930) 103 Cal.App. 306, 310 [Although defendant "followed the

despicable calling of usurer" and had twice been convicted under the criminal statute, his conduct was not a public nuisance under the provisions of Civ.Code, § 3479 and was not enjoinable].)

Second, our opinion in *People v. Lim, supra,* 18 Cal.2d 872, affirms the equal dignity, at least as far as the protection of equity is concerned, of private, property-based interests and those values that are in essence collective, arising out of a shared ideal of community life and the minimum conditions for a civilized society. "Courts have held that public and social interests, as well as the rights of property," Chief Justice Gibson wrote, "are entitled to the protection of equity." (*Id.,* at p. 877.) In a sense that cannot easily be dismissed, the availability of equitable relief to counter public nuisances is an expression of " 'the interest of the public in the *quality* of life and the total community environment.' " (*People* ex rel. *Busch v. Projection Room Theater, supra,* 17 Cal.3d at p. 52.)

C. The Relation Between Crimes And Public Nuisances

As Justice Brewer noted in the *Debs* case: "A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interference, actual or threatened, with property or rights . . . but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law. . . . " (*In re Debs, supra,* 158 U.S. at p. 593.)

We made the same point in *People v. Lim, supra,* 18 Cal.2d 872, 879, quoting a West Virginia case: "We think the proper rule, therefore, and the one to which this state is committed is expressed in the following language from *State v. Ehrlick*[, *supra,* 64 S.E. 935, 939]: 'It is also competent for the Legislature . . . to declare any act criminal and make the repetition or continuance thereof a public nuisance . . . or to vest in courts of equity the power to abate them by injunction. . . . ' "

In the *Ehrlick* case itself, the West Virginia high court wrote that "the Attorney General may proceed in equity on behalf of the public to abate the nuisance, if it be one. Whether it be a criminal nuisance or not is wholly immaterial. If it is indictable as a crime, it does not bar the remedy in equity, because the citizen and the general public have an immediate right to the enjoyment of the thing interfered with. A criminal prosecution is inadequate in such case, because it does not prevent the doing of the unlawful act. It may ultimately correct the wrong, but, while the process of correction is going on, the public is deprived of an important and valuable right, wherefore the injury is irreparable. In such cases it is not the criminality of the act that gives jurisdiction in equity, but the deprivation of personal and property rights interfered with, injured, destroyed, or taken away by the unlawful act." (*State v. Ehrlick, supra,* 64 S.E. 935, 939; see also *People v. Seccombe, supra,* 103 Cal.App. 306, 314 [relying on *State v. Ehrlick, supra,* 64 S.E. 935, 939]; *Weis v. Superior Court* (1916) 30 Cal.App. 730, 732; *People v. Steele* (1935) 4 Cal.App.2d 206, 208; *Commonwealth v. McGovern* (Ky. 1903) 75 S.W. 261, 264; *Nathan H. Schur, Inc. v. City of Santa Monica* (1956) 47 Cal.2d 11 (*semble*); *Armory Park v.*

Episcopal Community Services (Ariz. 1985) 712 P.2d 914, 923 ["We hold, therefore, that conduct which unreasonably . . . interferes with the public health, safety, peace, comfort or convenience is a public nuisance . . . even if that conduct is not specifically prohibited by the criminal law."]; cf. Rest.2d Torts, § 821B, com. d, p. 89 ["This [statement, i.e., that 'in order to be treated as a public nuisance, conduct must have been already proscribed by the state as criminal'] is too restrictive. . . . [T]here is clear recognition that a defendant need not be subject to criminal responsibility."].)

The Court of Appeal was thus partly accurate in reasoning that "a public nuisance is always a criminal offense," for indeed it is. (See Pen. Code, § 372 [maintenance of a public nuisance is a misdemeanor].) It is the corollary to that proposition – that the superior court's injunction was valid *only* to the extent that it enjoined conduct that is *independently* proscribed by the Penal Code – that is flawed. Acts or conduct which qualify as public nuisances are enjoinable as civil wrongs *or* prosecutable as criminal misdemeanors, a characteristic that derives not from their status as independent crimes, but from their inherent tendency to injure or interfere with the community's exercise and enjoyment of rights common to the public. It is precisely this recognition of – and willingness to vindicate – the value of community and the collective interests it furthers rather than to punish criminal acts that lie at the heart of the public nuisance as an equitable doctrine. We will return to this notion of the community and its collective values as the touchstone of the public nuisance doctrine later, when we assess the sufficiency of the superior court's interlocutory decree in

light of the requirements laid down in *People v. Lim, supra,* 18 Cal.2d 872. Before doing so, however, we first consider defendants' challenges to the constitutionality of the preliminary injunction, challenges that the Court of Appeal found persuasive.

II. Defendants' Constitutional Challenges To Provisions (a) And (k) Of The Preliminary Injunction

A. Standard Of Review

At this initial stage in the proceeding, the scope of our inquiry is narrow. We review an order granting a preliminary injunction under an abuse of discretion standard. (*King v. Meese* (1987) 43 Cal.3d 1217, 1227-1228; *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.) Review is confined, in other words, to a consideration whether the trial court abused its discretion in " 'evaluat[ing] two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued.' " (*Cohen v. Board of Supervisors, supra,* 40 Cal.3d at p. 286.) And although we will not ordinarily disturb the trial court's ruling absent a showing of abuse, an order granting or denying interlocutory relief reflects nothing more than the superior court's evaluation of the controversy on the record before it *at the time* of its ruling; it is not an adjudication of the ultimate merits of the dispute. (*Ibid;* see also *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1994) 7 Cal.4th

860, 879, fn. 10; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527.)

B. First Amendment Challenges

1. Associational Interests

The Court of Appeal held that paragraph (a) of the preliminary injunction, enjoining defendants from "*Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant . . . or with any other known 'VST' (Varrio Sureno Town or Varrio Sureno Treces) or 'VSL' (Varrio Sureno Locos) member,*" was invalid on associational grounds; that is, the provision infringed defendants' right to associate with fellow gang members, a right protected by the First Amendment. We disagree.

In a series of opinions, the United States Supreme Court has made it clear that, although the Constitution recognizes and shields from government intrusion a *limited* right of association, it does not recognize "a generalized right of 'social association.' " (*Dallas v. Stranglin* (1989) 490 U.S. 19, 25.) As we explain, neither does the First Amendment protect the collective public activities of the gang members within the four-block precinct of Rocksprings, activities directed in the main at trafficking in illegal drugs and securing control of the community through systematic acts of intimidation and violence.

The high court has identified two kinds of associations entitled to First Amendment protection – those with an "intrinsic" or "intimate" value, and those that are "instrumental" to forms of religious and political expression and activity. Of the first, the court has said that it is

"central to the concept of liberty" and is exemplified by personal affiliations that "attend the creation and sustenance of a family – marriage . . . ; the raising and education of children [citation]; and cohabitation with one's relatives." (*Roberts v. United States Jaycees* (1984) 468 U.S. 609, 619.) Such affiliations, the court has remarked, "involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things . . . they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." (*Id.*, at p. 620.)

The second kind of association that merits First Amendment protection is composed of groups whose members join together for the purpose of pursuing "a wide variety of political, social, economic, educational, religious, and cultural ends." (*Roberts v. United States Jaycees, supra*, 468 U.S. at p. 622.) This instrumental right of protected association is directly related to the "individual's freedom to speak, to worship, and to petition the government for the redress of grievances" because, without it, these liberties themselves could scarcely exist, much less thrive. (*Ibid.*)

It is evident that whatever else it may be in other contexts, the street gang's conduct in Rocksprings at issue in this case fails to qualify as either of the two protected forms of association. Manifestly, in its activities within the four-block area of Rocksprings, the gang is not an association of individuals formed *"for the purpose* of

engaging in protected speech or religious activities." (*Board of Dirs. of Rotary Int'l v. Rotary Club* (1987) 481 U.S. 537, 544, italics added.) Without minimizing the value of the gang to its members as a loosely structured, elective form of social association, that characteristic is in itself insufficient to command constitutional protection, at least within the circumscribed area of Rocksprings. As the court pointed out in *Dallas v. Stranglin, supra,* 490 U.S. at page 25, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."

Defendants contend that if there is any doubt that association with other gang members "is afforded constitutional protection, the Supreme Court put the notion to rest in *Dawson v. Delaware* (1992) 503 U.S. 159 . . . where it held that association with a prison gang, the Aryan Brotherhood, is constitutionally protected." This argument misreads the court's opinion in Dawson. There, the court reversed a penalty jury's capital verdict on the ground that an abbreviated stipulation of the parties – reciting that the " 'Aryan Brotherhood refers to a white racist prison gang' " which originated in California in the 1960's " 'and now exist[s] in many state prisons including Delaware' " – lacked any relevance to the capital sentencing issue before the jury. (*Dawson v. Delaware* (1992) 503 U.S. 159, 162, 165.) Far from holding that "association with a prison gang is constitutionally protected," the vice

condemned by the court in *Dawson* was the very "narrowness of the stipulation [that] left the Aryan Brotherhood evidence totally without relevance to Dawson's sentencing proceeding." (*Ibid.*)

Nor do the circumstances in this case implicate the other associational form worthy of First Amendment protection – personal affiliations whose characteristics include "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." (*Roberts v. United States Jaycees, supra,* 468 U.S. at p. 620.) We may assume the members of defendants' gang share common values and that group membership and the affiliations it engenders can be a source of personal "enrichment" to some or all of them. Defendants' organization may thus share one or two of the characteristics that define intrinsically valuable and constitutionally protected associations, lying somewhere this side of the anonymity of the Jaycees or a teenage dance hall. The constitutionally significant factors on which associational protection depends, however, are not ones to be mechanically applied and ticked off. At bottom, protected rights of association in the intimate sense are those existing along a narrow band of affiliations that permit deep and enduring personal bonds to flourish, inculcating and nourishing civilization's fundamental values, against which even the state is powerless to intrude.

Freedom of association, in the sense protected by the First Amendment, "does not extend to joining with others for the purpose of depriving third parties of their lawful rights." (*Madsen v. Women's Health Center, Inc.* (1994) ___ U.S. ___, ___, [114 S.Ct. 2516, 2530], hereafter *Madsen*.) We

do not, in short, believe that the activities of the gang and its members in Rocksprings at issue here are either "private" or "intimate" as constitutionally defined; the fact that defendants may "exercise *some* discrimination in choosing associates [by] a selective process of inclusion and exclusion" (*New York State Club Assn. v. New York City* (1988) 487 U.S. 1, 13) does not mean that the association or its activities in Rocksprings is one that commands protection under the First Amendment.

2. *"Overbreadth" Challenge*

The Court of Appeal also invalidated paragraph (a) of the trial court's preliminary decree on the ground that these provisions were "overbroad," as that term has come to be understood and applied in the context of First Amendment litigation. It acknowledged that the reach of the overbreadth doctrine has been cabined in a series of high court opinions, e.g., *New York State Club Assn. v. New York City, supra,* 487 U.S. at page 11 (doctrine is a narrow exception and requires finding of " 'a realistic danger that the statute itself will significantly compromise a recognized First Amendment protection of parties not before the Court' "); *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 613 (overbreadth doctrine is "strong medicine" that is used "sparingly and only as a last resort"); and *Wisconsin v. Mitchell* (1993) 508 U.S. 476, ___ [113 S.Ct. 2194, 2201]. However, it did not consider one crucial fact: *no one,* apart from defendants themselves, is or can be subject to the prophylactic relief granted by the trial court.

As we explain, the foundation of the overbreadth doctrine is the inhibitory effect a contested statute may

exert on the freedom of those who, although possibly subject to its reach, are *not* before the court. It is out of a generous concern for a statute's effects on the activities of such third persons that the high court has permitted facial challenges on behalf of those who are not parties to the litigation. Thus, even litigants whose activities are *not* constrained by the statute at issue and who might, as the court wrote of the permit requirement in *Thornhill v. Alabama* (1939) 310 U.S. 88, 97, "have had a license for the asking may . . . call into question the whole scheme of licensing when . . . prosecuted for failure to procure it."

Defendants do not attack the public nuisance statute itself, claiming that *it* suffers from the vice of overbreadth; instead, they attack the terms of the interlocutory decree as being unconstitutionally overbroad. The source of the high court's concern in the overbreadth cases, however, and the foundation of the doctrine itself, is the perceived danger to the constitutionally protected interests of those who, because they are not before the court, lack a judicial forum in which to litigate claims that a statute "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech" (*Thornhill v. Alabama, supra,* 310 U.S. at p. 97), and thus "may inhibit the constitutionally protected speech of [such] third parties" (*City Council of Los Angeles v. Taxpayers for Vincent* (1984) 466 U.S. 789, 798).

It is the absent members of this unrepresented class who, "sensitive to the perils posed by . . . indefinite language, avoid the risk . . . by restricting their conduct to that which is unquestionably safe" (*Baggett v. Bullitt* (1964) 377 U.S. 360, 372), for whom the overbreadth doctrine was fashioned. (See also *Broadrick v. Oklahoma, supra,*

413 U.S. at p. 612 ["Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."]; *In re M.S.* (1995) 10 Cal.4th 698, 709 ["litigants may challenge a statute not because their own rights of free expression are violated, but because the very existence of an overbroad statute may cause others not before the court to refrain from constitutionally protected expression"].)

The high court recently identified a related and constitutionally significant difference between injunctions and statutes in the context of protected speech claims. In *Madsen, supra,* ___ U.S. ___ [114 S.Ct. 2516], the court pointed out that the narrow and particularized focus inherent in the nature of the injunction as an equitable remedy is also significant in evaluating the contention that features of a given decree suffer from constitutional overbreadth. Like the injunction in *Madsen,* the trial court's interlocutory decree here does not embody the broad and abstract commands of a statute. Instead, it is the product of a concrete judicial proceeding prompted by particular events – inimical to the well-being of the residents of the community of Rocksprings – that led to a specific request by the City for preventive relief.

As with any injunction, the preliminary decree here is addressed to identifiable parties and to specific circumstances; the enjoined acts are particularly described in the trial court's order. Unlike the pervasive "chill" of an abstract statutory command that may broadly affect the conduct of an absent class and induce self-censorship, the

decree here did not issue until after *these* defendants had had their day in court, a procedure that assures " 'a prompt and carefully circumscribed determination of the issue.' " (*Kingsley Books, Inc. v. Brown* (1957) 354 U.S. 436, 442.) In short, as one commentator has pointed out, "An injunction may be more effective at stopping the activity at which it is aimed, but it is also more narrowly confined. There is less risk of deterring activities beyond the adjudicated target of suppression – activities plainly outside the injunctive ban but arguably within the necessarily more general prohibition of a penal law." (Jefferies, *Rethinking Prior Restraint* (1983) 92 Yale L.Rev. 409, 429.)

Manifestly, the paradigm for an overbreadth challenge is not present in *this* case. Here there is no possibility that the concerns motivating the high court in its classic overbreadth opinions – the "chilling effect" of abstract, broadly framed statutes on the conduct of those not before the court (see, e.g., *Dombrowski v. Pfister* (1965) 380 U.S. 479, 487) – could place at risk *any* protected conduct other than that of defendants themselves. The only individuals subject to the trial court's interlocutory decree in this case, including those features contested as "overbroad," are *named parties* to this action; their activities allegedly protected by the First Amendment have been and are being aggressively litigated. There is accordingly no basis, legal or factual, for the professed concern that protected speech or communicative conduct by anyone *other* than defendants might be endangered by the terms of the trial court's injunction. In that sense, defendants' claim of overbreadth, made with respect to paragraph (a) of the preliminary injunction, is not cognizable.

Our conclusion with respect to defendants' "overbreadth" claim does not mean they may not be heard to complain that the provisions of the preliminary injunction – as applied to *them* and their conduct in Rocksprings – are broader than constitutionally sustainable. Rather, in this case that contention falls under the standard formulated by the court in *Madsen, supra,* ___ U.S. ___ [114 S.Ct. 2516] – the requirement that the superior court's decree burden no more of defendants' speech than necessary to serve the significant governmental interest at stake. We will consider that distinct claim separately, when we come to evaluate the sufficiency of the injunction under the standard announced by the court in *Madsen*. (See, *post,* at pp. 28-32.)

C. Defendants' Fifth Amendment "Void-For-Vagueness" Challenge To Provisions (a) And (k)

We consider next the claim of defendants that provisions (a) and (k) of the interlocutory injunction are "void for vagueness." (See, e.g., Note, *The Void-for-Vagueness Doctrine In the Supreme Court* (1960) 109 U.Pa.L.Rev. 67.) Here again, the Court of Appeal was persuaded of the merits of defendants' constitutional challenge to the preliminary decree, ruling that provisions (a) and (k) were unconstitutionally vague and thus unenforceable. Although, as we pointed out in *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1109, "[t]he concepts of vagueness and overbreadth are related," there are important differences. "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally

protected conduct." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 114, fn. omitted.)

Unlike the doctrine of overbreadth, which focuses on the impact of a statute on the conduct of persons not before the court, the claim that a law is unconstitutionally vague is not dependent on the interests of absent third parties. Instead, the underlying concern is the core due process requirement of adequate *notice*. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." (*Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453, fn. omitted; see also *People v. Heitzman* (1994) 9 Cal.4th 189, 199-200.) The operative corollary is that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (*Connally v. General Construction Co.* (1929) 269 U.S. 385, 391.)

In its more recent applications of the vagueness doctrine, the high court has also expressed a concern for the potential for arbitrary and discriminatory enforcement inherent in vague statutes. (See, e.g., *Smith v. Goguen* (1974) 415 U.S. 566, 574 ["We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement. (Fn. omitted.)"]; *Kolender v. Lawson* (1983) 461 U.S.

352, 357 [doctrine seeks to avoid "arbitrary and discriminatory enforcement."].) Thus, a law that is "void for vagueness" not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." (*Grayned v. City of Rockford, supra,* 408 U.S at pp. 108-109, fn. omitted.)

The scope of permissible challenges to a law based on grounds of vagueness differs in another important respect from challenges based on overbreadth. While a claim of overbreadth may succeed if it is shown that the law at issue is "substantially overbroad," that is, affects more than a marginal group of those potentially subject to its sweep (*Broadrick v. Oklahoma, supra,* 413 U.S. at p. 615), a claim that a law is unconstitutionally vague can succeed *only* where the litigant demonstrates, not that it affects a substantial number of others, but that the law is vague as to her or "impermissibly vague in *all of its applications.*" (*Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 497-498, italics added; see also *Parker v. Levy* (1974) 417 U.S. 733, 755-757; Tribe, American Constitutional Law (2d ed. 1988) § 12-32, p. 1036.)

We begin our consideration of defendants' vagueness claims with a pair of principles endorsed by the United States Supreme Court as reliable guides for applying the doctrine in particular cases. The first principle is derived from the concrete necessity that abstract legal commands must be applied in a specific *context.* A contextual application of otherwise unqualified legal language may supply the clue to a law's meaning, giving facially

standardless language a constitutionally sufficient concreteness. Indeed, in evaluating challenges based on claims of vagueness, the court has said "[t]he particular context is all important." (*American Communications Assn. v. Douds* (1950) 339 U.S. 382, 412.) We recently made the same point in *Tobe v. City of Santa Ana, supra,* 9 Cal.4th at page 1107, when we said the "Court of Appeal erred in holding that the ordinance is unconstitutionally vague. The terms which the Court of Appeal considered vague are not so *when the purpose clause of the ordinance is considered and the terms are read in that context* as they should be." (Italics added.) This observation is particularly apropos here.

The second guiding principle is the notion of "*reasonable* specificity" (*Coates v. City of Cincinnati* (1971) 402 U.S. 611, 614, italics added), or "[*r*]*easonable* certainty." (*People v. Victor* (1965) 62 Cal.2d 280, 300, italics added; see also *In re Marriage of Walton* (1972) 28 Cal.App.3d 108, 116 [statute will not be held void for vagueness "if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources"].) As the high court has pointed out, "few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limits the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

(*Boyce Motor Lines v. United States* (1952) 342 U.S. 337, 340.) In short, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." (*Grayned v. City of Rockford, supra,* 408 U.S. at p. 110, fn. omitted.)

In the Court of Appeal's view, provision (a)'s prohibition against associating with "any other known 'VST' . . . or 'VSL' member" might apply to a circumstance in which a defendant was engaged in one of the prohibited activities with someone known to the police but *not known to him* to be a gang member. According to the Court of Appeal, such indefiniteness presented "a classic case of vagueness." We agree that in such a hypothetical case, the City would have to establish a defendant's *own knowledge* of his associate's gang membership to meet its burden of proving conduct in violation of the injunction. Far from being a "classic" instance of constitutional vagueness, however, we think the element of knowledge is fairly implied in the decree. To the extent that it might not be, we are confident that the trial court will, as the Court of Appeal did in *People v. Garcia* (1993) 19 Cal.App.4th 97, 103, impose such a limiting construction on paragraph (a) by inserting a knowledge requirement should an attempt be made to enforce that paragraph of the injunction. With that minor emendation, the text of provision (a) passes scrutiny under the vagueness doctrine.

The Court of Appeal found paragraph (k), enjoining defendants from "confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings' . . . known to have complained about

gang activities[,]" impermissibly vague in two respects. First, like paragraph (a), it speaks of persons "known to have complained about gang activities," without indicating how or even whether a defendant is to be charged with this knowledge. The discussion with respect to the knowledge requirement of provision (a) of the decree applies equally to this provision and, so construed, it too passes muster.

Second, according to the Court of Appeal, provision (k) fails to define sufficiently the words "confront," "annoy," "provoke," "challenge," or "harass"; it thus fails to provide a standard of conduct for those whose activities are proscribed. Yet similar words were upheld against claims of vagueness by the Supreme Court in *Madsen, supra,* ___ U.S. ___ [114 S.Ct. 2516]. There, the high court affirmed injunctive relief prohibiting petitioners from engaging in similar – if not more broadly phrased – conduct: " 'intimidating, harassing, touching, pushing, shoving, crowding, or assaulting persons entering or leaving.' " (*Id.*, at p. ___ [114 S.Ct. at p. 2522].) We find nothing in the context of this case, factually similar in many respects to the situation before the court in *Madsen,* that makes the same words, sufficiently definite there, somehow constitutionally infirm here.

Here again, "[t]he particular context is all important." (*American Communications Assn. v. Douds, supra,* 339 U.S. 382, 412.) The words of provision (k) which the Court of Appeal considered irretrievably vague are simply not, at least in the constitutional sense, when the objectives of the injunction are considered and the words of the provision are read in context. Finally, the declarations filed by the City in support of preliminary relief

leave little doubt as to what kind of conduct the decree seeks to enjoin. One Rocksprings resident recounted an incident in which gang members had threatened to cut out the tongue of her nine-year-old daughter if she talked to the police; she stated that other residents had been threatened as well. Another resident reported her neighbor's property had been vandalized and the resident threatened after complaining to police that gang members had urinated in her garage. A police officer declared Rocksprings residents had told him gang members confront and threaten them with physical violence when asked to leave residential property. Others refused to furnish declarations, fearing for their lives if any gang member should discover their identities. We conclude neither of the two provisions should have been invalidated by the Court of Appeal on vagueness grounds.

III. Claim That The Step Act Is The Exclusive Means Of Abating Gang Behavior As A Public Nuisance

Defendants contend that the STEP Act (Pen. Code, § 186.20 et seq.) is the exclusive means of enjoining criminal street gangs and preempts use of the general public nuisance statutes. We disagree. By express provision, the act is not the *exclusive* remedy for abating gang activity constituting a public nuisance. Under the STEP Act, a building or place used by members of a criminal street gang for specified illegal activities is declared a nuisance per se: "Every building or place used by members of a criminal street gang for the purpose of the commission of [specified] offenses . . . and every building or place wherein or upon which that criminal conduct by

gang members takes place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, *whether it is a public or private nuisance.*" (Pen. Code, § 186.22a, subd. (a), italics added.) The act goes on to provide that "[n]othing in this chapter shall preclude any aggrieved person from seeking any other remedy provided by law." (*Id.*, subd. (d).) It thus plainly contemplates remedies in addition to the act to abate criminal gang activities, including those made available by the general public nuisance statutes.

In this case, the City expressly sought equitable relief, not under the STEP Act, but under the general public nuisance statutes.[4] Accordingly, we need not determine whether some or all of the conduct enjoined would also fall within the scope of the act or whether any of the defendants could be enjoined under its provisions.

IV. Evaluating The Limits Of The Preliminary Injunction

A. Substantive Limits

Having concluded that provisions (a) and (k) of the preliminary injunction are not unconstitutionally vague

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[4] Defendants concede that the People did not purport to seek injunctive relief under the STEP Act, but invoked the general public nuisance statutes; they argue, however, that the superior court erroneously relied on the STEP public nuisance provision. A reviewing court will uphold a judgment if it is correct for any reason " 'regardless of the correctness of [its] grounds. . . . ' [Citation.] 'It is judicial action and not judicial reasoning which is the subject of review. . . . ' " (*United Pacific Ins. Co. v. Hanover Ins. Co.* (1990) 217 Cal.App.3d 925, 933, fn. omitted.)

or overbroad and do not infringe defendants' constitutionally protected associational interests, we must complete our inquiry by considering the limitations on the scope of the interlocutory decree as a matter of both public nuisance and constitutional law. We must ask, in other words, two questions: First, whether the activity enjoined under these two provisions reasonably falls within the statutory definition of a public nuisance as construed in *People v. Lim, supra,* 18 Cal.2d 872, 878, and second, whether the two provisions comply with the constitutional standard announced by the Supreme Court in *Madsen, supra,* ___ U.S. ___ [114 S.Ct. 2516], that is, whether they "burden no more speech than necessary to serve a significant governmental interest." (*Id.*, at p. ___ [114 S.Ct. at p. 2525].)

That the conduct enjoined by the trial court meets the statutory definition of a public nuisance is clear from the account of conditions in Rocksprings recited at the outset of this opinion. To constitute a public nuisance under our Civil Code, conduct must be "injurious to health, . . . indecent or offensive to the senses, . . . an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct[ ] free passage or use, in the customary manner, of any . . . public park, square, street or highway." (Civ. Code, § 3479.) In addition, the conduct must affect "an entire community or neighborhood, or any considerable number of persons." (Civ. Code, § 3480.)

The many declarations filed with the superior court by the City in support of its request for injunctive relief meet these criteria. Gang members not only routinely obstruct Rocksprings residents' use of their own property

– by such activities as dealing drugs from apartment houses, lawns, carports, and even residents' automobiles – but habitually obstruct the "free passage or use, in the customary manner," of the public streets of Rocksprings. It is likewise clear from this record that the conduct of gang members qualifies as "indecent or offensive to the senses" of reasonable area residents: the hooligan-like atmosphere that prevails night and day in Rocksprings – the drinking, consumption of illegal drugs, loud talk, loud music, vulgarity, profanity, brutality, fistfights and gunfire – easily meet the statutory standard. Nor is it difficult to see how threats of violence to individual residents and families in Rocksprings, murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson and associated crimes obstruct the free use of property and interfere with the enjoyment of life of an entire community.

Do provisions (a) and (k) of the superior court's preliminary injunction meet the constitutional test formulated by the Supreme Court in *Madsen, supra,* ___ U.S. ___, ___ [114 S.Ct. 2516, 2525] by "burden[ing] no more speech than necessary to serve" an important governmental interest? We conclude both provisions satisfy the constitutional test. As noted, provision (a) effectively forbids gang members from engaging in any form of social intercourse with anyone known to them to be a gang member "anywhere in public view" within the four-block area of Rocksprings. The provision's ban on all forms of association – "standing, sitting, walking, driving, gathering or appearing anywhere in public view" – does not violate the *Madsen* standard merely because of its breadth. The provision seeks to ensure that, within the circumscribed

area of Rocksprings, gang members have no opportunity to combine.

It is the threat of *collective* conduct by gang members loitering in a specific and narrowly described neighborhood that the provision is sensibly intended to forestall. Given that overriding purpose, the prohibitions enumerated in provision (a) are not easily divisible. Permitting two or more gang members to drive together but not sit, or to stand together but not walk, would obviously defeat the core purpose behind the proscription. Moreover, given the factual showing made by the City in support of preliminary relief – the carnival-like atmosphere of collective mayhem described above (see, *ante*, at pp. 1-2, 29) – we cannot say that the ban on any association between gang members *within the neighborhood* goes beyond what is required to abate the nuisance.

The effect of provision (a)'s ban on defendants' protected *speech* is minimal. To judge from the evidence placed before the superior court, the gangs appear to have had no constitutionally protected or even lawful goals within the limited territory of Rocksprings. So far as the record before the trial court shows, the gangs and their members engaged in no expressive or speech-related activities which were not either criminally or civilly unlawful or inextricably intertwined with unlawful conduct. According to the declaration of Officer Niehoff, an eight-year veteran of the San Jose Police Department: "Illegal drug dealing by Sureno gang members, including VSL/VST, is a common practice, and the gang entity provides protection to the individual members, allowing them to establish areas where they can conduct their illegal activities. The protective shield of the gang has

allowed individual members to commit crimes such as narcotic trafficking that result in personal gain. These crimes are committed in association with the gang because of the protection offered to the members by virtue of their gang affiliation. In the Rocksprings area, the fact that numerous narcotics transactions occurred is a direct result of the protective shield provided by VSL/VST. Individuals who claimed membership in VSL or VST were at liberty to deal drugs in a veritable 'safe' zone."

Does provision (a)'s prohibition on a gang member associating with even a *single* fellow gang member within Rocksprings transgress the test of *Madsen, supra,* ___ U.S. ___ [114 S.Ct. 2516]? Could not the restriction be limited to barring associations between, say, *three* other gang members? Two gang members? On such a highly particular question, we are compelled to defer to the superior knowledge of the trial judge, who is in a better position than we to determine what conditions "on the ground" in Rocksprings will reasonably permit. Outside the perimeter of Rocksprings, the superior court's writ does not run; gang members are subject to no special restrictions that do not affect the general population. Given the limited area within which the superior court's injunction operates, the absence of any showing of constitutionally protected activity by gang members within that area, the aggravated nature of gang misconduct, the fact that even within Rocksprings gang members may associate freely out of public view, and the kind of narrow yet irreducible arbitrariness that inheres in such line-drawing, we conclude that this aspect of provision (a) passes muster as well under the standard of *Madsen, supra,* ___ U.S. ___ [114 S.Ct. 2516].

We reach a similar resolution with respect to provision (k). That provision forbids those subject to the injunction from confronting, intimidating or similarly challenging – including assaulting and battering – residents of Rocksprings, "or any other persons" whom gang members know have complained about their conduct within the neighborhood. It has long been the rule, of course, that physical violence and the threat of violence are not constitutionally protected: "The First Amendment does not protect violence." (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 916, hereafter *Claiborne Hardware*.) Because the conduct proscribed by provision (k) consists of threats of violence and violent acts themselves, it "fall[s] outside the protection of the First Amendment because [such acts] coerce by unlawful *conduct*, rather than persuade by expression, and thus play no part in the 'marketplace of ideas.' As such, they are punishable because of the state's interest in protecting individuals from the fear of violence, the disruption fear engenders and the possibility the threatened violence will occur." (*In re M.S., supra*, 10 Cal.4th 698, 714, italics in original.) "[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." (*Wisconsin v. Mitchell* (1993) 508 U.S. 476, 484.) By the same token, "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution." (*Milk Wagon Drivers v. Meadowmoor Dairy* (1940) 312 U.S. 287, 293.)

B. Those Bound By The Preliminary Injunction

Defendants contend that they may not be bound by the injunction except on proof that each possessed "a specific intent to further an unlawful aim embraced by [the gang]." The quoted language is the test formulated by the United States Supreme Court in *Claiborne Hardware, supra,* 458 U.S. at page 925, as being required to sustain damages liability against individual members of a group. *Claiborne Hardware* is distinguishable on its facts. Defendants there were members of a local chapter of a national civil rights organization. Each was held liable in state court proceedings for business losses suffered by the plaintiff merchants over the seven-year duration of a civil rights boycott sponsored by the organization. Although the boycott was for the most part peaceable and law abiding, there were sporadic incidents of violence by some members, resulting in economic losses to the plaintiffs.

Vacating the state court damages award, the high court held that "mere association with [the] group – absent a specific intent to further an unlawful aim embraced by that group – is an insufficient predicate for liability." (*Claiborne Hardware, supra,* 458 U.S. at pp. 925-926.) The state courts, the Supreme Court reasoned, had "relied on isolated acts of violence during a limited period to uphold [plaintiffs'] recovery of all business losses sustained over a 7-year span. . . . The court's judgment 'screens reality' and cannot stand." (*Id.*, at p. 924, italics and fns. omitted.) Unlike the record in

Claiborne Hardware, supra, 458 U.S. 886, the evidence submitted by the City in support of the preliminary injunction here presents a portrait of gang affiliated youths whose collective activities, *within the four-block area of Rocksprings,* create and sustain the "urban war zone" described at the outset of this opinion. The precedents that control the reach of injunctive relief in such circumstances are *Milk Wagon Drivers v. Meadowmoor Dairy, supra,* 312 U.S. 287, and *Madsen, supra,* ___ U.S. ___ [114 S.Ct. 2516].

In *Milk Wagon Drivers v. Meadowmoor Dairy, supra,* 312 U.S. 287, 291, (hereafter *Milk Wagon Drivers*), the trial court issued a preliminary injunction "restraining all union conduct, violent and peaceful," arising out of a labor dispute. The union protested, arguing the decree violated the First Amendment rights of its members by enjoining acts of peaceful picketing. The Illinois Supreme Court affirmed the broad scope of the interlocutory decree and directed that a permanent injunction, restraining *peaceful* as well as violent acts by union members, be entered as well. The United States Supreme Court upheld the injunction, framing the case as one where "the question . . . is whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed." (*Id.,* at p. 292.)

As in *Milk Wagon Drivers, supra,* 312 U.S. 287, here "the injunction is confined," encompassing conduct occurring within a narrow, four-block residential neighborhood. As in *Milk Wagon Drivers,* it "deals with this narrow area precisely because the coercive conduct

affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity . . . [and] . . . must be read in the context of its circumstances." (*Id.*, at p. 298.) As in *Milk Wagon Drivers*, the high court in *Madsen, supra*, ___ U.S. ___, ___ [114 S.Ct. 2516, 2522], upheld an injunction directed against "congregating, picketing, patrolling, demonstrating or entering" within 36 feet of a health clinic in which therapeutic abortions were performed. That provision of the decree, along with another setting restrictions on noise, was directed not only at the anti-abortion organizations themselves, but at allied organizations and "*their* officers, agents, *members*, employees and servants, and . . . *all persons acting in concert* or participation with them, or on their behalf." (*Id.* at p. ___, fn. 1, italics added [114 S.Ct. at p. 2521, fn. 1].)

Both *Milk Wagon Drivers, supra*, 312 U.S. 287, and *Madsen, supra*, ___ U.S. ___ [114 S.Ct. 2516], thus stand for the proposition that, in a proper case, an organization and its individual members are enjoinable *without* meeting the "specific intent to further unlawful group aims" standard applied in *Claiborne Hardware, supra*, 458 U.S. 886. Certainly that proposition comprehends paragraphs (a) and (k) of the preliminary injunction, the only two provisions now before us. For we have already concluded that the conduct proscribed by those two provisions – appearing publicly in Rocksprings with others known to a defendant to be gang members, and harassing area residents known to a defendant to have complained to public authorities about gang activities in Rocksprings – are activities integral to the public nuisance that afflicts

Rocksprings *and* do not implicate protected First Amendment conduct. (See *Claiborne Hardware, supra,* at pp. 918-920.)

That being the case, the interim relief entered by the superior court is indistinguishable from time-honored equitable practice applicable to labor unions, abortion protesters or other identifiable groups. Because such groups can act only through the medium of their membership, " . . . it has been a common practice to make the injunction run also to classes of persons through whom the enjoined person may act, such as agents, servants, employees, aiders [and] abettors. . . . " (*Berger v. Superior Court* (1917) 175 Cal. 719, 721; see also *In re Lennon* (1897) 166 U.S. 548, 554 ["To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice."]; cf. Fed.Rules Civ. Proc., rule 65(d), 28 U.S.C. [injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise"].)

We see nothing in this case – where instead of naming the gang organizations themselves as parties, the City named as individual defendants all 38 gang members it was able to identify – that removes it from the usual rule applied in *Berger v. Superior Court, supra,* 175 Cal. 719, and many other cases. The City's evidence in support of preliminary equitable relief demonstrated that it was the gang itself, acting through its membership, that was

responsible for creating and maintaining the public nuisance in Rocksprings. Because the City *could* have named the gangs themselves as defendants and proceeded against them, its decision to name individual gang members instead does not take the case out of the familiar rule that both the organization and the members through which it acts are subject to injunctive relief.

For present purposes, it is enough to observe that there was sufficient evidence before the superior court to support the conclusions that the gang and its members present in Rocksprings were responsible for the public nuisance, that each of the individual defendants either admitted gang membership or was identified as a gang member, and that each was observed by police officials in the Rocksprings neighborhood. Although all but three of the eleven defendants who chose to contest entry of the preliminary injunction – Miguel Moreno, Rafael Ruiz, and Blanca Gonzalez – were shown to have committed acts, primarily drug related, comprising specific elements of the public nuisance, such individualized proof is not a condition to the entry of preliminary relief based on a showing that it is the gang, acting through its individual members, that is responsible for the conditions prevailing in Rocksprings. Additional proceedings will be required to enforce the specific terms of the preliminary injunction. Should contempt proceedings ensue, each individual defendant will have an opportunity to contest any claim by the City that he or she has violated specific terms of the preliminary injunction.

V. Conclusion

To hold that the liberty of the peaceful, industrious residents of Rocksprings must be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense. The freedom to leave one's house and move about at will, and to have a measure of personal security is "implicit in the concept of ordered liberty" enshrined in the history and basic constitutional documents of English-speaking peoples. (*Wolf v. Colorado* (1949) 338 U.S. 25, 27-28; *Palko v. Connecticut* (1937) 302 U.S. 319, 325.) Preserving the peace is the first duty of government, and it is for the protection of the community from the predations of the idle, the contentious, and the brutal that government was invented.

Writing in 1834 of the events that shaped the American Revolution, Alexis De Tocqueville remarked how the American struggle for independence was uniquely shaped by "a love for law and order." In this case we consider whether, after the passage of more than two centuries, we remain free to reaffirm those fundamental values of ordered liberty. We do.

The judgment of the Court of Appeal is reversed insofar as it invalidated paragraphs (a) and (k) of the preliminary injunction and concluded that defendant Blanca Gonzalez was not subject to its terms. Because our grant of review encompassed only those two of the fifteen provisions invalidated by the Court of Appeal, we

do not address any other aspect of the preliminary injunction entered by the superior court.

BROWN, J.

WE CONCUR:

GEORGE, C.J.
BAXTER, J.
WERDEGAR, J.

PEOPLE ex rel. GALLO v. CARLOS ACUNA et al.

S046980

CONCURRING AND DISSENTING OPINION BY KENNARD, J.

I concur with the majority in upholding the preliminary injunction's paragraph (k), one of the two paragraphs at issue in this case. Paragraph (k) enjoins defendants, all of whom are members of either of two gangs (Varrio Sureno Loco (VSL) and Varrio Sureño Treces or Varrio Sureño Town (VST)), from intimidating, harassing, threatening, provoking, or assaulting persons within a four-block area of San Jose known as Rocksprings. At trial, the San Jose City Attorney presented evidence that such conduct by the named defendants and/or other VSL and VST members obstructed the "free use of property" (Civ. Code, § 3479) within the Rocksprings area "so as to interfere with the comfortable enjoyment of life or property" (*ibid.*), and affected "at the same time an entire community or neighborhood, or any

considerable number of persons" (Civ. Code, § 3480), and accordingly constituted a public nuisance (*ibid.*).

Because the prohibitions set forth in paragraph (k) of the preliminary injunction have the legitimate purpose of ridding the Rocksprings neighborhood of activities that interfered with the residents' comfortable enjoyment of life or property, paragraph (k) prohibits no more conduct than is necessary to abate the nuisance at hand and therefore is constitutionally permissible. Nor is paragraph (k) unconstitutionally vague. As the majority explains (maj. opn., *ante*, at pp. 23-24), the terms of paragraph (k), read within the context of the nuisance proven by the San Jose City Attorney, provide reasonable certainty and specificity. Due process requires no more.

I do not, however, join the majority in upholding the injunction's paragraph (a), which prohibits the named defendants from being in the company of any other VSL or VST member while "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view" in the four-block Rocksprings area. The evidence presented in this case falls far short of establishing that so drastic a restriction on the rights of defendants and other VSL and VST members to peacefully assemble is necessary to abate the public nuisance.

Under the First and Fourteenth Amendments of the federal Constitution, a state may not make criminal the exercise of the right of assembly simply because its exercise may offend some people. (*Coates v. City of Cincinnati* (1971) 402 U.S. 611, 615-616.) Otherwise, the *Coates* court noted, "the right of the people to gather in public places

for social or political purposes would be continually subject to summary suspension" and the law would provide "an obvious invitation to discriminatory enforcement against those whose . . . ideas, . . . lifestyle, or . . . physical appearance is resented by the majority of their fellow citizens." (*Ibid.*)

As I explained in a dissenting opinion in *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1995) 10 Cal.4th 1009, 1032, when an injunction threatens to infringe on activity protected by the First Amendment, courts "apply a more stringent test than the standard used to evaluate the constitutionality of content-neutral statutes regulating the time, place, and manner of expression." Such an injunction must be " ' "couched in the narrowest terms that will accomplish the pin-pointed objective" of the injunction.' " (*Id.* at p. 1033, quoting *Madsen v. Women's Health Clinic* (1994) ___ U.S. ___, ___ [114 S.Ct. 2516, 2525].) Applying this test to paragraph (a), I am not convinced that its prohibition of *any public contact* between defendants and other members of the VSL and VST gangs within the four-block Rocksprings neighborhood is couched in the narrowest terms possible to accomplish the injunction's goal of restoring the residents' "comfortable enjoyment of life [and] property" (Civ. Code, § 3479).

There is no doubt that gang activity presents a serious threat to the peace and security of many a neighborhood. As I pointed out recently in *People v. Gardeley* (1996) 14 Cal.4th 605, 609, which upheld sentence enhancement provisions of the Street Terrorism Enforcement and Prevention Act, also known as the STEP Act, the Legislature has expressly declared that " 'California is in

a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.' " (Quoting Pen. Code, § 186.21.) When gang activity becomes a public nuisance, prosecutorial agencies may seek injunctive relief to abate the nuisance. (Code Civ. Proc., § 731.) But when a constitutionally protected interest is at stake, such as the right of peaceful assembly in this case, the injunctive relief must be narrowly tailored so as to minimally infringe upon the protected interest.

Here, paragraph (a) does not satisfy this test, for it prohibits defendants from "gathering or appearing anywhere in public view" in the Rocksprings neighborhood with any other member of the VSL and VST gangs. Paragraph (k), by contrast, enjoins no more conduct than is necessary to eliminate the public nuisance in the Rocksprings area, and therefore is constitutionally permissible.

The Court of Appeal in this case invalidated both paragraph (k) and paragraph (a) of the injunction. For the reasons set forth above, I join the majority in reversing that part of the Court of Appeal's judgment invalidating paragraph (k), but, unlike the majority, I would affirm that part of the Court of Appeal's judgment invalidating paragraph (a).

KENNARD, J.

PEOPLE EX REL. GALLO v. ACUNA ET AL.

S046980

CONCURRING AND DISSENTING OPINION BY CHIN, J.

I am in general agreement with the majority, and in particular with its conclusion that a court may enjoin as a public nuisance acts not in themselves crimes. I disagree with the majority, however, on one narrow, but important issue. I would hold that the evidence is insufficient to enjoin two of the thirty-eight named defendants: Rafael Ruiz and Blanca Gonzalez.

The legal principle at issue is quite simple. The law requires some link between each defendant who is subject to an injunction and the problem the injunction addresses. The majority argues that in this case gang membership and a one-time presence in Rocksprings is enough to establish this link. The majority reasons the trial court could have enjoined the gangs as a whole, and therefore it could enjoin individual gang members instead. (Maj. opn., *ante*, at pp. 35-36.) I agree that, in an appropriate case, a court may enjoin individuals based on group membership. (Cf. *Madsen v. Women's Health Center, Inc.* (1994) ___ U.S. ___, ___ fn. 1 [114 S.Ct. 2516, 2521, fn. 1] (*Madsen*).) But the requirement of proof is no less rigorous in such a case. "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 920, fn. omitted (*Claiborne Hardware*).) I do not

believe the City of San Jose (the City) has met this standard with respect to Rafael Ruiz and Blanca Gonzalez.

The majority relies on *Drivers Union v. Meadowmoor Co.* (1941) 312 U.S. 287, 291 (*Drivers Union*), in which the trial court enjoined "all union conduct." But *Drivers Union* did not involve the issue whether a court may enjoin individuals based on group membership. Rather, at issue was whether a court may enjoin peaceful acts of picketing when those acts are "enmeshed with contemporaneously violent conduct." (*Id.* at p. 292.) The United States Supreme Court upheld the injunction, but emphasized the factfinder's determination that the peaceful picketing "was set in a background of violence" and therefore had the character of a threat. (*Id.* at p. 294.) The trial court in this case made no similar finding with respect to the conduct of Rafael Ruiz and Blanca Gonzalez.

The majority also relies on *Madsen*, in which the trial court enjoined members of Operation Rescue (and other organizations) from impeding access to an abortion clinic in Melbourne, Florida. The United States Supreme Court again upheld parts of the injunction, but reaffirmed the necessity of a link between each defendant and the problem the injunction addresses. (*Madsen, supra,* ___ U.S. at p. ___, fn. 3 [114 S.Ct. at p. 2524, fn. 3].) Significantly, the high court did not even discuss the evidentiary showing necessary for including individual members of an organization within the scope of an injunction. The parties apparently did not raise the issue, perhaps because the record amply supported including organization members within the scope of the injunction.

The parties did, however, raise the issue in *Claiborne Hardware, supra,* 458 U.S. 886. *Claiborne Hardware* concerned a boycott of certain White merchants in Claiborne County, Mississippi. The boycott turned violent at times, and the Mississippi Supreme Court upheld an award of damages against, among others, certain members of the National Association for the Advancement of Colored People who supported the boycott. The United States Supreme Court agreed Mississippi could impose tort liability when violence or threats of violence resulted in business losses. (*Id.* at p. 916.) But the high court added: "[T]he presence of activity protected by the First Amendment imposes restraints . . . on the persons who may be held accountable for those damages." (*Id.* at pp. 916-917.) The court concluded: "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." (*Id.* at p. 920.) "[M]ere association with [a] group – absent a specific intent to further an unlawful aim embraced by that group – is an insufficient predicate for liability." (*Id.* at pp. 925-926.)

Drivers Union and *Madsen* are perfectly consistent with the standard the high court announced in *Claiborne Hardware.* Whether a court can enjoin individuals based on group membership depends on the nature of the group and the implications of membership under the circumstances. In the case of some groups, membership evidences a common purpose. If one purpose or activity of the group is the creation of a public nuisance, a court may enjoin both the group and its members. But the

Sureño street gangs at issue in this case have fluid membership, no organizational structure, and no express purpose except perhaps to compete with members of rival Norteño gangs. The fact that many Sureño gang members commit crimes in Rocksprings does not establish that the gangs have crime as a universal purpose, primary activity, or condition of membership. The Sureño gangs might have some subdivisions that are criminally inclined and others that are not. Obviously, courts cannot enjoin all Mexican Americans because some Mexican Americans contribute to the nuisance in Rocksprings. Gang membership is no different, absent some evidence that contributing to the nuisance is an express or implied condition of membership.

The City's criteria for establishing Sureño gang membership do not include the intent to further the Sureño gangs' aims. Under these criteria, the City would consider a person to be a member of a Sureño gang if, for example, that person on two occasions wore baggy pants, blue clothes, or "Los Angeles Raiders" garments. The City also identifies persons who admit gang membership as gang members, regardless of the circumstances of their admission. As the declaration of Juan Pineda Hernandez indicates, people who are not gang members may assert membership for a variety of reasons, including youthful arrogance or a desire to be placed in protective custody. Thus, a person who merely claims membership in one of the Sureño gangs may not fully share that gang's aims. (See Burrell, *Gang Evidence: Issues for Criminal Defense* (1990) 30 Santa Clara L.Rev. 739, 750 ["Law enforcement officials admit that there are many different levels of

[gang] membership. [Fn. omitted.] Thus, to simply identify a person as a 'gang member' conveys little about that person's true level of involvement or activity. [Fn. omitted.]"].)

Accordingly, I do not agree the trial court was free to enjoin individual Sureño gang members simply because it could have enjoined the Sureño gangs as a whole. Moreover, the majority does not convince me the record in this case would have allowed the trial court to enjoin the Sureño gangs as a whole. As the majority emphasizes, the record paints an ugly picture of life in Rocksprings. Crime and contempt for authority are so pervasive that criminals would seem to be in charge. Sadly, despite all our technology and resources, utter lawlessness is the all-too-common mark of American urban life at the close of the 20th century. A society that is committed to protecting civil rights and civil liberties is not helpless to prevent such shameful atrocities. Dire problems demand bold solutions, and circumstances like those in Rocksprings warrant highly aggressive law enforcement. Nevertheless, the City must prove its case. A court's judgment may not stand on a visceral prejudice against street gangs or on a pervasive mood of public hysteria in the face of a law-and-order crisis; rather, that judgment must stand on evidence.

Though the majority refers to "48 declarations submitted by the City in support of its plea for injunctive relief" (maj. opn., *ante*, at p. 1), most of this evidence establishes only that some gang *members* commit crimes in Rocksprings, contributing to the general state of lawlessness in the neighborhood. The evidence describing the nature of the Sureño gangs, and thus establishing a

possible link between the gangs themselves (as opposed to gang members) and the nuisance in Rocksprings, consists primarily of the declarations of Officer Mikael Niehoff and Sergeant Richard Saito. Those declarations describe the Sureño gangs as "criminal street gangs," but the San Jose Police Department's definition of "criminal street gang" states nothing about the purpose or primary activity of the gang as a whole. Under its definition, any association of persons who individually engage in crime, even a sports team, would be a criminal street gang.

Of course, numerous declarations state the crime in Rocksprings is "gang related," but the San Jose police classify as gang related any crime a gang member commits. By that method of classification, much of the crime in Rocksprings might also be football related because the perpetrators of the crimes are football fans. The City's standard hardly establishes a logical link between the gang and the crime, particularly in light of the City's loose definition of gang member. Moreover, even under the City's over-inclusive standard, only 12 to 14 percent of documented crimes in Rocksprings during the year preceding the date of Sergeant Saito's declaration had indicia of being gang related. The City argues this percentage may actually be higher because it did not keep track of whether crimes were gang related. I agree. The percentage *may* actually be higher. But it *may not be*. The City did not keep track, so it has not proved its case.

Considering the record as a whole, I agree an assertion of Sureño gang membership is an indication of unlawful purpose. But I would not conclude that a person's assertion of gang membership and a one-time presence in Rocksprings is sufficient to establish the

necessary link between that person and the nuisance in Rocksprings. Accordingly, I would uphold the injunction in the case of a person who is an actual gang member *only if the record includes some corroborating evidence showing that person substantially contributed to the nuisance in Rocksprings or intends to do so in the future.*

The only evidence linking Blanca Gonzalez with the nuisance in Rocksprings is that she was in Rocksprings "wearing a black top and black jeans," which according to police was "consistent with members of Sureño criminal street gangs," and she claimed gang membership. This evidence is not sufficient to prove (even at the preliminary injunction stage) that she "held a specific intent to further [the gangs'] illegal aims," assuming the Sureño gangs have illegal aims. (*Claiborne Hardware, supra,* 458 U.S. at p. 920.) Thus, I agree with the Court of Appeal that the trial court should not have enjoined Blanca Gonzalez.

The question is closer with respect to Rafael Ruiz. Ruiz also admitted gang membership. Moreover, some evidence indicates he committed a crime in Rocksprings, but this evidence is very thin. Ruiz was in a group that loosely matched the description of a group that had reportedly been selling drugs in the Rocksprings area. While I am sympathetic to the need for aggressive law enforcement, I conclude this evidence does not link Rafael Ruiz with the nuisance in Rocksprings sufficiently to support preliminary injunctive relief. Accordingly, I would hold that the trial court should not have enjoined him.

The gangs in question here are loosely organized associations of individuals with no express common purpose or central leadership. Some people may dress as gang members or claim membership in the gangs because of peer pressure or out of fear; the people primarily responsible for the public nuisance in Rocksprings may be a small minority of gang members. I do not discount the serious threat to community values that criminal street gangs pose. Nevertheless, we cannot turn a blind eye to the necessities of proof. I believe the majority has done so in the case of Rafael Ruiz and Blanca Gonzalez.

CHIN, J.

PEOPLE EX REL. GALLO v. ACUNA ET AL.

S046980

DISSENTING OPINION BY MOSK, J.

No doubt Montesquieu, Locke, and Madison will turn over in their graves when they learn they are cited in an opinion that does not enhance liberty but deprives a number of simple rights to a group of Latino youths who have not been convicted of a crime. Mindful of the admonition of another great 18th century political philosopher, Benjamin Franklin, that "[t]hey that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety," I would, unlike the majority, in large part affirm the judgment of the Court of Appeal.

I.

On February 26, 1993, the City of San Jose (hereafter the City) filed a complaint in the superior court seeking preliminary and permanent injunctive relief against 38 named and 100 unnamed individuals who were purportedly "validated" as active members of one of two street gangs, Varrio Sureño Loco (VSL) and Varrio Sureño Treces or Varrio Sureño Town (VST). The complaint seeks to restrict their activities in a four-block residential area known as "Rocksprings."[1]

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[1] The city "validates" as a criminal street gang an association of three or more persons with a common name or symbol whose members collectively or individually engage in a pattern of criminal conduct, as defined by Penal Code section 186.22, subdivision (f). It does not, however, adhere to the statutory definition of a gang member. (Pen. Code, § 186.22, subd. (a) [gang member defined as "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang."].) Instead, to "validate" specific gang members, the City merely reviews police records to identify individuals who admit membership in a gang to a peace officer, probation officer, juvenile hall or youth ranch employee, or who meet two or more of the following conditions: wear clothing or tattoos indicating gang affiliation or use gang hand signs; are named by two or more members of a gang as a member; actively participate in a gang crime; are identified by a reliable informant as a gang member; or are observed associating with gang members two or more times. Using similar broad criteria, the Los Angeles Sheriff's Department has estimated that 47 percent of all African-American males between the ages of 21 and 24 are actual or suspected gang members. (Reiner (1992) Gangs, Crime and Violence in Los Angeles, p. 121.)

The complaint alleged that for more than 12 months, defendants "occupied" and "used the area commonly known as 'Rocksprings' . . . in such a manner so as to constitute a public nuisance in accordance with Civil Code [sections] 3479 and 3480. . . . " The "regular and continuous activities" alleged to constitute the public nuisance included: "homicide and attempted homicide, shootings, assault and battery with a vast array of weapons, vandalism, graffiti, sale and use of illegal narcotics, arson and theft . . . [and] blocking of free ingress and egress to the street. . . . " Defendants were also alleged to "have broken lights on private property, have shot at windows of buildings, have shot at rival gang members and innocent persons; have engaged in fights with other gangs and gang members; have caused, encouraged and/or participated in the drinking of alcoholic beverages by juveniles; have used loud profanities amongst each other and directed at other neighbors; have caused, encouraged, or participated in the use, possession and/or sale of illegal drugs; have confronted, intimidated, annoyed, harassed, challenged and provoked the residents of the neighborhood by their activities and have placed the residents of the neighborhood in fear of their safety, lives and property."

The City submitted declarations from the San Jose Chief of Police, police officers, neighborhood residents, and others describing the gangs and detailing specific incidents in Rocksprings and elsewhere involving defendants. They explain that the VSL/VST gangs have approximately 150 to 200 members, most of whom are Latino youths between the ages of 14 and 23 who claim allegiance to Southern California (hence "Sureño," which

is Spanish for "southern") or Mexico. The gangs claim as their insignia the number 13, the letter "M," and the color blue; they typically mark their turf with graffiti and tags that include the gang initials and variations on the number 13. The gangs lack a "structural hierarchy"; membership is "very fluid" and such that "many of its members did not know one another." Although their organization is loose and informal, gang members reportedly often cooperate with each other in drug selling and other illegal activities.

According to the declarations, drug dealing, fighting, and graffiti were constant problems in Rocksprings and occurred at all hours of the day and night. Gang members threatened and intimidated residents. For example, a gang member warned a nine-year-old girl who had told police officers where some drugs were hidden that he would cut her tongue out if she ever again talked to the police. In another incident, gang members threatened a Rocksprings resident and vandalized her property after she called the police to report that some gang members had urinated in her garage. The declarations also stated, however, that fully 86 percent of the reports of criminal activity in Rocksprings *do not* indicate that they are related to VSL or VST gangs: only 12 percent of the reports are believed by the City to be gang related and 2 percent were deemed "possibly gang-related."

Moreover, under the City's criteria for "validating" VST and VSL members, no history of criminal or disruptive activity in Rocksprings or elsewhere is required for an individual to be identified as a Sureño gang member. Indeed, an individual may be so identified simply if he or she "admits" to gang membership, or merely was seen in

association with another purported gang member on two occasions and wore clothing associated with the gang – including such ordinary apparel as baggy trousers and blue or black shirts or pants.

On February 26, 1993, the superior court granted the City's request for a temporary restraining order and issued an ex parte order to show cause, setting the case for further hearing on March 10, 1993. Five defendants appeared at the hearing. The superior court left the temporary restraining order standing against those defendants and issued an order granting a preliminary injunction against the remaining defendants. On May 28, 1993, six additional named defendants moved to set aside the orders.[2]

The superior court conducted a hearing on June 28, 1993. It issued an order granting a preliminary injunction against 11 defendants, enjoined from performing, "directly or indirectly," certain specified acts within the Rocksprings neighborhood.[3]

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[2] The six defendants submitted declarations in support of the motion to vacate, including explanations of why certain defendants failed to attend the hearing on the order to show cause. Some of the defendants described their family and other ties to the Rocksprings neighborhood; a few also stated that they had never been – or were no longer – Sureño gang members.

[3] The superior court did not prepare a written statement of decision. The order granting the preliminary injunction enjoins defendants Carlos Acuna, Jose Bravo, Eberardo Cervantes, Martin Davila, Blanca Gonzalez, Jorge Gonzales, Juan Pineda Hernandez, Miguel Lopez, Miguel Moreno, Flavio Quinonez, and Rafael Ruiz from the following acts:

"(a) Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant

Defendants appealed from that order. The Court of Appeal concluded that "insofar as the injunction reaches

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herein, or with any other known 'VST' (Varrio Sureno Town or Varrio Sureno Locos) member;

"(b) Drinking alcoholic beverages in public excepting consumption on properly licensed premises or using drugs;

"(c) Possessing any weapons including but not limited to knives, dirks, daggers, clubs, nunchukas [*sic*; nunchakus], BB guns, concealed or loaded firearms, and any other illegal weapons as defined in the California Penal Code, and any object capable of inflicting serious bodily injury including but not limited to the following: metal pipes or rods, glass bottles, rocks, bricks, chains, tire irons, screwdrivers, hammers, crowbars, bumper jacks, spikes, razor blades; razors, sling shots, marbles, ball bearings;

"(d) Engaging in fighting in the public streets, alleys, and/or public and private property;

"(e) Using or possessing marker pens, spray paint cans, nails, razor blades, screwdrivers, or other sharp objects capable of defacing private or public property;

"(f) Spray painting or otherwise applying graffiti on any public or private property, including but not limited to the street, alley, residences, block walls, vehicles and/or any other real or personal property;

"(g) Trespassing on or encouraging others to trespass on any private property;

"(h) Blocking free ingress and egress to the public sidewalks or street, or any driveways leading or appurtenant thereto in 'Rocksprings';

"(i) Approaching vehicles, engaging in conversation, or otherwise communicating with the occupants of any vehicle or doing anything to obstruct or delay the free flow of vehicular or pedestrian traffic;

"(j) Discharging any firearms;

"(k) In any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/

no further than the Constitution allows, it can properly be used to abate gang-related criminal activity as a public nuisance." Determining that many of the provisions were

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or battering any residents or patrons, or visitors to 'Rocksprings', or any other persons who are known to have complained about gang activities, including any persons who have provided information in support of this Complaint and requests for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction;

"(l) Causing, encouraging, or participating in the use, possession and/or sale of narcotics;

"(m) Owning, possessing or driving a vehicle found to have any contraband, narcotics, or illegal or deadly weapons;

"(n) Using or possessing pagers or beepers in any public space;

"(o) Possessing channel lock pliers, picks, wire cutters, dent pullers, sling shots, marbles, steel shot, spark plugs, rocks, screwdrivers, 'slim jims' and other devices capable of being used to break into locked vehicles;

"(p) Demanding entry into another person's residence at any time of the day or night;

"(q) Sheltering, concealing or permitting another person to enter into a residence not their own when said person appears to be running, hiding, or otherwise evading a law enforcement officer;

"(r) Signaling to or acting as a lookout for other persons to warn of the approach of police officers and soliciting, encouraging, employing or offering payment to others to do the same;

"(s) Climbing any tree, wall, or fence, or passing through any wall or fence by using tunnels or other holes in such structures;

"(t) Littering in any public place or place open to public view;

unconstitutionally vague or overbroad, or prohibited too much ordinary and innocuous conduct, it struck paragraphs (a), (e), (i), (m), (n), (o), (q), (r), (s), (v), (w), and (x) in whole and paragraphs (c), (k), and (l) in part. As modified, it affirmed the order granting the preliminary injunction.

The City sought review of the Court of Appeal's decision only as to two provisions: paragraphs (a) and (k). We granted review.[4]

"(u) Urinating or defecating in any public place or place open to public view;

"(v) Using words, phrases, physical gestures, or symbols commonly known as hand signs or engaging in other forms of communication which describe or refer to the gang known as 'VST' or 'VSL' as described in this Complaint or any of the accompanying pleadings or declarations;

"(w) Wearing clothing which bears the name or letters of the gang known as 'VST' or 'VSL';

"(x) Making, causing, or encouraging others to make loud noise of any kind, including but not limited to yelling and loud music at any time of the day or night."

[4] Thus, as it indicated in written and oral argument, the City *did not* challenge the Court of Appeal's determination that the following conduct, inter alia, was improperly enjoined: possession or use in Rocksprings of such everyday items as beepers, pens, spray paint cans, nails, screwdrivers, or any "sharp objects capable of defacing private or public property"; "encouraging" or "participating" in the use or possession of narcotics; "engaging in conversation, or otherwise communicating with the occupants of any vehicle"; using communicative hand signs or signals describing or referring to the gangs; wearing clothing bearing the name or letters associated with the gangs; climbing trees or walls or "passing through" fences. The City impliedly concedes that the Court of Appeal correctly struck these provisions of the injunction as

II.

We review an order granting a preliminary injunction for abuse of discretion. (*Hunter v. City of Whittier* (1989) 209 Cal.App.3d 588, 595.) "Ordinarily an appeal from the granting of a preliminary injunction involves a very limited review of the [superior court's] exercise of discretion concerning two factors: (1) the likelihood that plaintiffs will ultimately prevail and (2) the interim harm plaintiffs will sustain if the preliminary injunction is denied compared to the interim harm defendant will suffer if the injunction is granted pending a final determination of the merits." (*Ibid.*) Thus, an appellate decision usually does not constitute a final adjudication of the ultimate rights in controversy; it merely determines whether the superior court abused its discretion based on the record before it at the time of the ruling.

Of course, questions underlying the preliminary injunction are reviewed under the appropriate standard of review. Thus, for example, issues of fact are subject to review under the substantial evidence standard; issues of pure law are subject to independent review. (*Bullock v. City and County of San Francisco* (1989) 221 Cal.App.3d 1072, 1094 [" 'the standard of review [for issues of pure law] is not abuse of discretion but whether statutory or constitutional law was correctly interpreted and applied by the trial court.' "].)[5] This case presents several issues

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enjoining more conduct than was necessary to abate the nuisance and on constitutional grounds.

[5] "[T]he issue can arise, for example, when it is contended that an ordinance or statute is unconstitutional on its face and that no factual controversy remains to be tried. If such a

of pure law, principally: (1) whether injunctive relief under public nuisance provisions for gang-related activity was preempted by the California Street Terrorism Enforcement and Prevention Act (hereafter the STEP Act), codified at Penal Code section 188.20 et seq.; (2) whether, as a matter of law, certain conduct could be abated as a public nuisance; and (3) whether certain provisions of the preliminary injunction were impermissibly vague or restrictive of protected First Amendment rights.[6]

As to the remaining issues – including the likelihood that the City will succeed in establishing that specific

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question of pure law is presented, it can sometimes be determinative over the other factor, for example, when the defendant shows that the plaintiff's interpretation is wrong as a matter of law and thus the plaintiff has no possibility of success on the merits. [Citations.] Even where the question of law is not entirely determinative, it may be appropriate for the appellate court to express its opinion in order to clarify or narrow the issues for trial." (*Hunter v. City of Whittier, supra,* 209 Cal.App.3d at p. 595-596; see, e.g., *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 287-290.)

[6] Defendants contend that de novo review of the entire record is required because the superior court's order affects their First Amendment rights. (See *Hurley v. Irish-American Gay Group of Boston* (1995) ___ U.S. ___ [115 S.Ct. 2338, 2344.].) As *Hurley* explains, however, "[t]he 'requirement of independent appellate review . . . is a rule of federal constitutional law,' . . . which generally requires us to 'review the finding of facts by a State court . . . *where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts,* . . . ' " (*Ibid.*, italics added.) That is not the case here; as will appear, our inquiry is limited to the *facial* validity of certain provisions of the injunction under the United States Constitution.

conduct of the VSL/VST gangs constitutes a public nuisance and that individual defendants were properly enjoined – we review for abuse of discretion.

III.

As a threshold matter, defendants contend that the STEP Act is the exclusive means of enjoining criminal street gangs, preempting general public nuisance statutes. They are wrong. The act, by its express provisions, is not the exclusive remedy for abating gang activity constituting a public nuisance.

Under the STEP Act, a building or place used by members of a criminal street gang for specified illegal activities constitutes a nuisance per se: "Every building or place used by members of a criminal street gang for the purpose of the commission of [specified] offenses . . . and every building or place wherein or upon which that criminal conduct by gang members takes place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, *whether it is a public or private nuisance.*" (Pen. Code, § 186.22a, subd. (a)., italics added.) The Legislature has provided, however, that "[n]othing in this chapter shall preclude any aggrieved person from seeking any other remedy provided by law." (*Id.*, § 186.22a, subd. (d).) The act thus plainly contemplates additional remedies to abate criminal gang activities, including those under our general public nuisance statutes.

The City expressly sought relief not under the STEP Act, but, instead, under the general public nuisance statutes.[7] Accordingly, we need not determine whether some or all of the conduct enjoined would also fall within the scope of the act or whether any of the defendants could be enjoined under its provisions.

IV.

The City contends that all of the conduct described in paragraphs (a) and (k) of the preliminary injunction order was properly abated by the superior court as a public nuisance. Defendants claim that none of the conduct could be so enjoined. Neither is correct. As the Court of Appeal correctly concluded, some, but not all, of the conduct could not unreasonably be abated under our general public nuisance statutes.

Civil Code section 3479 defines a public nuisance as: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully

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[7] Defendants concede that the City did not purport to seek injunctive relief under the STEP Act, but invoked the general public nuisance provisions; they argue, however, that the superior court erroneously purported to rely on the provision. We will uphold a judgment if it is correct for any reason " 'regardless of the correctness of [its] grounds. . . . ' 'It is judicial action and not judicial reasoning which is the subject of review. . . . ' " (*United Pacific Ins. Co. v. Hanover Ins. Co.* (1990) 217 Cal.App.3d 925, 933, fn. omitted.)

obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." Civil Code section 3480 provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." A public nuisance is subject to a civil action for abatement, and may, as here, be "brought by the city attorney of any town or city in which such nuisance exists." (Code Civ. Proc., § 731.)

The act or condition to be abated may consist of criminal or noncriminal conduct, but the equitable remedy exists only "where the objectionable activity can be brought within the terms of the statutory definition of public nuisance." (*People v. Lim* (1941) 18 Cal.2d 872, 879.) "[E]quity is loath to interfere where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted." (*Id.* p. 880; accord, *Nathan H. Schnur, Inc. v. City of Santa Monica* (1956) 47 Cal.2d 11, 19.)[8]

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[8] That both criminal and noncriminal conduct can be enjoined as a public nuisance is clear under our statutory and case law. (See, e.g., Civ. Code, § 3369 ["Neither specific nor preventive relief can be granted . . . to enforce a penal law, except in a case of nuisance or as otherwise provided by law."]; Pen. Code, § 186.20 et seq. [STEP Act]; *id.*, § 11525 et seq. [Red Light Abatement Law]; (*People ex rel. Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 49, 53 [exhibition of obscene books];

Nor may an injunction "go . . . further than is absolutely necessary to protect the lawful rights of the parties seeking such injunction." (*People v. Mason, supra,* 124 Cal.App.3d at p. 354.) Rather, it is "important for the trial court to limit the scope of the injunction, taking only those measures which would afford the People the relief to which they are entitled." (*Ibid.*; see also *Anderson v. Souza* (1952) 38 Cal.2d 825, 840-841 [" 'Injunctive process ought never to go beyond the necessities of the case.' "].)

In addition, of course, our general public nuisance statutes "must be enforced in such a way as to operate in a constitutional fashion." (*People* ex rel. *Busch v. Projection*

Nathan H. Schnur, Inc. v. City of Santa Monica, supra, 47 Cal.2d at pp. 18-19 [" 'Conduct against which injunctions are sought in behalf of the public is frequently criminal in nature. . . . [That] will not prevent the intervention of equity where a clear case justifying equitable relief is present. . . . "]; *People v. Lim, supra,* 18 Cal.2d 872 [gambling house]; *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 341 [pollution of water]; *Hayman v. Block* (1986) 176 Cal.App.3d 629, 644 [blocking right of way]; *People v. Mason* (1981) 124 Cal.App.3d 348, 353 [noise emanating from bar and restaurant]; *Vedder v. County of Imperial* (1974) 36 Cal.App.3d 654, 661 [fire hazard].) The City contends that the Court of Appeal's decision "relied substantially upon the premise that courts can enjoin only criminal, as opposed to noncriminal, conduct as a public nuisance." Not so. The Court of Appeal did not apply any such general rule; it merely concluded that the specific noncriminal conduct included within the superior court's order could not be appropriately enjoined under general public nuisance statutes. It did err, however, to the extent it held that all criminal conduct constitutes a public nuisance. Even if it were correct that, as it states, " 'a public nuisance is *always* a criminal offense,' " the inverse is not true. (See Pen. Code, § 370; Rest.2d Torts, § 821B, com. d, p. 89.)

Room Theater, supra, 17 Cal.3d at p. 55.) In particular, "restrictions upon the exercise of First Amendment rights [citation] must be drawn with a narrow specificity calculated to prevent repression of expressive activities as to which restriction is constitutionally forbidden." (*In re Berry* (1968) 68 Cal.2d 137, 155; see *Burton v. Municipal Court* (1968) 68 Cal.2d 684, 696 [invalidating restrictions on operation of motion pictures]; *City of Indio v. Arroyo* (1983) 143 Cal.App.3d 151, 158-159 [sign ordinance unconstitutionally overbroad as applied to noncommercial wall mural].)

"The First Amendment generally prevents government from proscribing speech [citation], or even expressive conduct [citation], because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." (*R.A.V. v. City of St. Paul, Minnesota* (1992) 505 U.S. 377, 382.) The presumption of invalidity applies with particular force to injunctions. "Injunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances" and therefore require "a somewhat more stringent application of general First Amendment principles." (*Madsen v. Women's Health Center* (1994) 512 U.S. ___, ___ [114 S.Ct. 2516, 2524].) Accordingly, an injunction restricting speech or other expressive conduct must be content neutral and "burden no more speech than necessary to serve a significant government interest." (*Id.* at pp. ___ [114 S.Ct. at pp. 2525]; *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1995) 10 Cal.4th 1009, 1019-1024.)

An injunction restricting constitutionally protected activity must also be sufficiently clear to withstand a challenge on the ground of vagueness under the due

process clauses of the United States and California Constitutions. (U.S. Const., Amends. V, XIV; Cal. Const., art I, § 7). Vague injunctions, like vague laws, " ' "offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." ' " (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 567-568.) The provisions of an injunction " ' "should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." ' " (*Id.* at p. 568.)

Finally, an injunction restricting constitutionally protected activity must be narrowly tailored to withstand challenge on the ground of overbreadth. "[A]n overbreadth challenge implicates the constitutional interest in due process of law. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, §§ 7 subd. (a), 24.) The overbreadth doctrine provides that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected

freedoms.' [Citation.] ¶ . . . ¶ Nevertheless, a facial overbreadth challenge is difficult to sustain. . . . '[A]pplication of the overbreadth doctrine . . . is, manifestly, strong medicine. It has been employed . . . sparingly and only as a last resort.' [Citation.] Consequently, to justify a conclusion of facial overbreadth, 'the overbreadth of a [restriction] must not only be real, but substantial as well. . . . ' " (*Williams v. Garcetti, supra,* 5 Cal.4th at p. 577.)

V.

I turn now to the individual provisions of the preliminary injunction that are at issue here.

a.

I agree with the Court of Appeal that following provisions of the preliminary injunction should be sustained, because they restrict gang-related conduct that the superior court not unreasonably found was likely to be proved on the merits to constitute a public nuisance in the Rocksprings neighborhood: paragraphs (b) (public consumption of alcoholic beverages or drugs); (d) (fighting in the public streets); (f) (spray painting or otherwise applying graffiti to public or private property); (g) (trespassing on or encouraging others to trespass on any private property); (h) (blocking free ingress and egress to the public sidewalks or street or to any driveways leading or appurtenant thereto in Rocksprings); (j) (discharging firearms); (p) (demanding entry into another person's residence); (t) (littering in any public place or place open to public view); and (u) (urinating or defecating in any public place or place open to public view). The record

includes allegations and supporting declarations concerning the prevalence of these activities by VSL-VST gang members in Rocksprings. The activities also readily fall within the statutory definition of a "nuisance" as "[a]nything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any- . . . public park, square, street, or highway" (Civ. Code, § 3479.) and as a "public nuisance" as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons. . . . " (*id.*, § 3480.) That some or all of these activities may also constitute criminal violations does not limit the superior court's power to grant a preliminary injunction in this case.

b.

As to the remaining provisions of the preliminary injunction, as stated above, the City only contests the decision of the Court of Appeal regarding paragraphs (a) and (k). Unlike the majority, I agree with the Court of Appeal that the sweeping prohibitions of the former do not withstand scrutiny, and that the latter provision must be stricken in part.

Paragraph (a) enjoins "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public with any other defendant herein, or with any other known 'VST' . . . or 'VSL' . . . member." It applies without any requirement or condition that a defendant or his associate

be engaged in any illegal activity or misconduct related to the alleged public nuisance.

The provision is impermissibly vague. Who is a "known" VST or VSL member? And by whom is such membership "known"? (See *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 458 [expression "known to be a member [of any gang]" unconstitutionally vague]; *Farber v. Rochford* (N.D.Ill. 1975) 407 F.Supp. 529, 532 [phrase "known to be [narcotic addict or prostitute]" impermissibly requires court to "indulge in conjecture as to how reputation might be ascertained"].) In the absence of any specific definition of gang membership, neither police officers nor courts are provided with a consistent standard for determining when a violation of the injunction occurred.

Thus, even if we were to accept the City's argument that the only reasonable construction of the prohibition is that it requires a *defendant* to know that the person he or she is standing, sitting, driving, walking, driving, gathering, or appearing with is a gang member, it remains susceptible to arbitrary enforcement. Without a definition of gang membership, how would a defendant know when he or she was violating the injunction? It is also unclear how a police officer would know whether or not *a defendant knows* that he or she is engaging in these activities with a gang member. Under the City's construction, a defendant could be arrested and prosecuted for walking down the street or simply appearing in public with another person, based on a police officer's mere supposition that such defendant "knew" he or she was in the company of a "known" gang member. As the Court of Appeal recognized: "it is apparent a defendant could be engaged in one of the activities prohibited in paragraph (a) with a person not known to him or to her but known

to police as a gang member, and suffer penalties for refusing to obey the injunction as a result. This is a classic case of vagueness."

Apart from these fundamental vagueness problems, the prohibitions under paragraph (a) go "further than is absolutely necessary to protect the lawful rights of the parties seeking such injunction" (*People v. Mason, supra,* 124 Cal.App.3d at p. 354) by penalizing much ordinary and lawful activity that does not fall within the statutory definition of a public nuisance. The prohibitions are not only sweeping, but absolute: they apply without regard to the defendant's intent or to the circumstances. In my view, a defendant may not be subject to a contempt sanction for merely walking in, driving through, or "appearing" in the Rocksprings neighborhood in the company of any "known" gang member without causing any disruption. Such everyday conduct is not "injurious to health, . . . or . . . indecent or offensive to the senses, or an obstruction to the free use of property" (Civ. Code, § 3479); nor does it affect "at the same time an entire community or neighborhood" (*id.*, § 3480.)[9]

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[9] As one court has observed: "The right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all – and to do so whenever one pleases – is an integral component of life in a free and ordered society. [Citations.] This right is rooted in the First Amendment's protection of freedom of expression and association, as well as . . . the Fifth Amendment's protection of fundamental liberty interests under the doctrine of substantive due process." (*Waters v. Barry* (D.D.C. 1989) 711 F.Supp. 1125, 1134; see also *Kolender v. Lawson* (1983) 461 U.S. 352, 358 [law prohibiting wandering the streets at night without identification implicated "consideration of the constitutional right to freedom of movement"].)

The City asserts, and the majority apparently agree, that the associational rights of the members of the loosely formed VSL and VST gangs are not "worthy" of constitutional protection; they argue that only "intimate" and "expressive" associations are entitled to such protection. Although I, too, deplore gang violence, I am unwilling, despite the apparent nature of the Sureño gangs, to conclude that their members do not also engage in innocent intimate or expressive conduct. Moreover, the cases on which the majority rely, principally *Roberts v. United States Jaycees* (1984) 468 U.S. 609, and *Dallas v. Stanglin* (1989) 490 U.S. 19, are not in point. The preliminary injunction directly impairs the kinds of everyday intimate and expressive association with friends and relatives that have traditionally been subject to constitutional protection.

Paragraph (k) enjoins "[i]n any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings', or any other persons who are known to have complained about gang activities, including any persons who have provided information in support of this Complaint and requests for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction." Conduct or speech that is physically threatening, harassing, intimidating, or assaultive may constitute a public nuisance and is not constitutionally protected. The superior court did not abuse its discretion, therefore, in imposing restrictions against "intimidating, harassing, threatening . . . assaulting and/or battering residents or patrons, or visitors to 'Rocksprings.' "

Although the terms "harassing" and "intimidating" are not specifically defined in the preliminary injunction, I disagree with the Court of Appeal's conclusion that they are too vague. Their meaning is sufficiently definite in the context of paragraph (k) as modified. I understand them to refer to behavior that would cause a reasonable person to suffer substantial emotional distress. I note that courts have frequently affirmed provisions of injunctions enjoining "intimidating" or "harassing" others. (See, e.g., *Planned Parenthood Shasta-Diablo, Inc. v. Williams, supra,* 10 Cal.4th at p. 1013 [anti-abortion protesters enjoined from harassing persons entering a clinic]; *In re Coleman* (1974) 12 Cal.3d 568, 571 [union members enjoined from committing "acts of harassment or intimidation"]; *M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. Culinary etc. Union* (1981) 124 Cal.App.3d 666, 672 [defendant unions enjoined from "threatening and/or committing acts of intimidation and physical violence"].)

The remainder of the provision, however, is too vague to withstand due process challenge. Activity in Racksprings that consists of "in any manner confronting, annoying, . . . challenging, [or] provoking" others may include so much ordinary social behavior – and so much that depends on the individual sensibilities of those who might feel annoyed, challenged, or provoked – that it impermissibly invites arbitrary enforcement. As the United States Supreme Court observed in *Coates v. City of Cincinnati* (1971) 402 U.S. 611, 614-616: "The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. . . . [¶] . . . The First and Fourteenth Amendments do not

permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens." (Fns. omitted; see also *H-CHH Associates v. Citizens for Representative Government* (1987) 193 Cal.App.3d 1193, 1221 [prohibition against "approaching" mall patrons overbroad because it "encompass[es] lawful, as well as unlawful, activity"].)

I also conclude that the phrase "persons known to have complained about gang activity" is too imprecise and must be stricken from paragraph (k). The City concedes as much. It is, in any event, superfluous: defendants are prohibited from threatening or assaulting any other person in Rocksprings, i.e., all "residents, patrons, or visitors."[10]

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[10] In paraphrasing paragraph (k), the majority repeatedly mischaracterize it as only forbidding defendants from intimidating or otherwise challenging Rocksprings residents or other persons whom gang members know have complained about their conduct within the neighborhood. It is not so limited. Rather, it expressly prohibits threatening, intimidating, harassing, or assaulting any Rocksprings resident *for any reason*.

VI.

The preliminary injunction names specific individuals; it is not directed against the VSL/VST gangs generally. Defendants contend that the superior court erred by enjoining six persons who have not been shown to be directly and substantially responsible for the public nuisance. The City counters that all six defendants were properly enjoined. Analogizing this matter to cases involving injunctions directed against unions and political organizations, it argues that "had [it] obtained a preliminary injunction against the VSL/VST street gangs to abate the public nuisance the gang created in Rocksprings, there is no question that injunction could have been made to bind the members of the gang as a class."

Neither is persuasive. I reject defendants' argument that an individual could properly be subject to the preliminary injunction only if he or she engaged in all of the enjoined conduct or was otherwise responsible for the public nuisance. I also reject the City's argument that each one of these defendants was properly enjoined because the superior court *could have* enjoined the VSL/VST gangs as a whole. They beg the question whether the gang members could properly have been enjoined as a class. Unlike the unions in *Watsonville Canning & Frozen Food Co. v. Superior Court* (1986) 178 Cal.App.3d 1242, or the anti-abortion organizations in *Madsen v. Women's Health Center, Inc., supra,* 512 U.S. ___ [114 S.Ct. 2516], the VSL/VST gang is a loose affiliation of hundreds of individuals, many of whom may never have participated in any of the activities constituting the public nuisance. Indeed, it is likely that many of them either live in

Rocksprings themselves or have friends and relatives who do.

As the City concedes, an individual may be "validated" as a VSL/VST gang member simply because he or she wears gang colors (including "neutral" colors like khaki, black, white, and blue) and is seen in the company of other "validated" gang members. I would agree with the Court of Appeal that, absent any showing that an individual "validated" as a gang member is likely to commit acts constituting a public nuisance in Rocksprings, he or she may not properly be subjected to the injunction, at least to the extent that it enjoins ordinary and innocent conduct within the Rocksprings neighborhood. (See *People v. Green* (1991) 227 Cal.App.3d 692, 699 [mere membership in a street gang is not a crime]; see also *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 920 [individuals could not be enjoined merely because they belonged to a group, some members of which committed acts of violence; to impose liability by reason of association alone, it must be shown that the group itself possessed unlawful goals and the named individual held a specific intent to further those goals].)[11]

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[11] Use of the word "gang" has a tendency to strike fear in the hearts of countless persons. The trial court and now a majority of this court have succumbed to that somewhat irrational fear. The Court of Appeal is to be commended for looking at the issue dispassionately and objectively. Some of these defendants have not been convicted of, or even charged with, any crime. Yet they are, under the injunction, deprived of a number of personal rights generally reserved to all free citizens – including the right to walk or drive through the Rocksprings neighborhood with a "known" gang member even for an innocent purpose.

Under our general nuisance statutes, "[a] judgment prohibiting a defendant from doing that which neither past acts nor present intent indicates he is likely to do unless prevented by a court of equity, is an erroneous exercise of equitable jurisdiction." (*People v. Robin* (1943) 56 Cal.App.2d 885, 887.) The mere facts that a defendant "admitted" gang membership to a police officer or others or was seen associating with gang members or wearing gang colors or insignia, do not indicate that he or she has, or will in the future, engage in conduct amounting to a public nuisance. In my view, individual defendants may be subject to the preliminary injunction only if the City establishes a likelihood that it will succeed on the merits of its claim that he or she actively participated in the activities constituting a public nuisance, or had a specific intention to do so.

The City presented evidence of conduct by each of the named defendants in and around the Rocksprings area.

As to one of the named defendants, Blanca Gonzalez, the evidence consisted solely of a police officer's statement to the effect that she was the driver of a car that was circling up and down the street in a purportedly Norteño-dominated neighborhood – apparently *not* Rocksprings. On that occasion, she was dressed in a black top and black jeans, consistent with members of Sureño gangs; she told the police officer that she belonged to the VST and VCT (also known as "Varrio Colonio Treces") gangs. On another occasion, a police officer on patrol in Rocksprings entered into a conversation with Gonzalez and another young Hispanic woman, after they drove up to an address in the Rocksprings neighborhood. Gonzales

told him that she did not live in Rocksprings and that she was a member of the VSL gang.

None of this alleged conduct establishes a likelihood that the City will succeed on the merits of its claim that Gonzalez has participated in conduct amounting to a public nuisance in the Rocksprings neighborhood or elsewhere, or that she has any specific intention of doing so.

The record also fails to support enjoining Miguel Moreno or Rafael Ruiz. Although both at one time "admitted" gang membership, neither was adequately shown to have engaged in conduct amounting to a public nuisance in or around Rocksprings. Moreno was merely "identified" by an unknown party as having been involved in a drug offense in Rocksprings. Ruiz was identified by a police officer responding to a citizen call concerning a drug transaction as loosely matching a description of one of the participants.

Defendants also argue that the superior court erred in naming three other gang members, Jorge Gonzalez, Eberardo Cervantes, and Miguel Lopez. I disagree. As the Court of Appeal not unreasonably concluded, an adequate showing was made for the purposes of ordering preliminary injunctive relief against them. All three not only freely admitted that they were active gang members, but they participated in conduct in and around Rocksprings amounting to a public nuisance.[12] I would

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[12] Thus, Jorge Gonzalez was stopped in connection with a gang-related disturbance in Rocksprings and admitted to police officers that he was a gang member; he was also found in possession of cocaine and marijuana after his car was stopped

therefore sustain the Court of Appeal's determination that these defendants were not unreasonably restrained.

In sum, I would affirm the judgment of the Court of Appeal to the extent that it sustained paragraphs (b), (c), (d), (f), (g), (h), (j), (p), (t), and (u) and struck paragraph (a). I would reverse the judgment of the Court of Appeal to the extent that it struck the terms "harassing" and "intimidating" from paragraph (k).

CONCLUSION

The majority would permit our cities to close off entire neighborhoods to Latino youths who have done nothing more than dress in blue or black clothing or associate with others who do so; they would authorize criminal penalties for ordinary, nondisruptive acts of walking or driving through a residential neighborhood with a relative or friend. In my view, such a blunderbuss approach amounts to both bad law and bad policy. Chief Justice Warren warned in *Jay v. Boyd* (1956) 351 U.S. 345, 367: "Unfortunately, there are some who think that the way to save freedom in this country is to adopt the

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by a police officer near Rocksprings; Eberardo Cervantes was observed selling illegal drugs in Rocksprings and prosecuted for possession for sale and sale of marijuana and cocaine; Miguel Lopez was observed selling narcotics in Rocksprings and was found to be in possession of marijuana. The question whether the superior court erred in naming five other defendants, Carlos Acuna, Jose Bravo, Hassan Martin Davila, Juan Pineda Hernandez, Flavio Quinonez, is not before us; it was neither ruled on by the Court of Appeal nor raised in the petitions for review.

techniques of tyranny." The majority here appear to embrace that misguided belief. Accordingly, I dissent.

MOSK, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE ex rel. JOAN R. GALLO, as City Attorney, etc.,

Plaintiff and Respondent,

v.

CARLOS ACUNA, et al.,

Defendants and Appellants.

H011802
(Santa Clara County Super.Ct.No. 729322)

(Filed Apr. 24, 1995)

_____ /

The City of San Jose has added a new weapon to its arsenal in the war against gangs; an injunction, based on public nuisance law, to abate gang activity in a four-block neighborhood. We are asked in this case to determine the constitutionality of the injunction. We conclude that, insofar as this injunction reaches no further than the Constitution allows, it can properly be used to abate gang-related criminal activity as a public nuisance. We also conclude that the STEP Act (The California Street Terrorism Enforcement and Prevention Act, Pen. Code, § 186.22, et seq.) is not at issue here. We will therefore modify the injunction's provisions to delete those constitutionally offensive portions, and, as modified, affirm its validity.

The underlying facts are these: In 1992, two "Sureno" street gangs, Varrio Sureno Loco (VSL) and Varrio Sureno Treces, or Varrio Sureno Town (VST), considered a four-block area of San Jose known as Rocksprings to be their

turf, or barrio. Although gang members did not live in this neighborhood, they would congregate there, marking their territory with graffiti, socializing and "partying" at all hours of the day and night, and engaging, despite law enforcement efforts, in almost constant drug dealing activity. Neighborhood residents were often too intimidated to leave their homes, and, fearing retaliation, often failed to report crimes to the police.

In response, respondent City of San Jose filed a complaint, on February 26, 1993, seeking preliminary and permanent injunctive relief against 38 named and 100 unnamed defendants, all of whom it had purportedly "validated" as members of VSL or VST. Twenty four of these defendants were served with copies of the summons and complaint. On this same date the trial court issued a temporary restraining order and an order to show cause, setting a hearing for March 10. Five defendants appeared at this hearing. The court issued a preliminary injunction against those defendants who had not appeared, and left the TRO standing against those defendants who had contested the preliminary injunction. On May 28, 1993, six defendants moved to vacate the preliminary injunction. These six defendants, in addition to the five who appeared to contest the injunction, are the appellants here.

On June 28, 1993, following a hearing, the trial court issued an order authorizing a preliminary injunction against the five defendants who contested the preliminary injunction, denying the six defendants' motion to vacate the injunction, and providing that the injunction would expire in one year or upon the grant or denial of a

permanent injunction.[1] Appellants filed a timely notice of appeal on August 27, 1993.

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[1] The order granting preliminary injunction enjoins defendants from:

"(a) Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant herein, or with any other known 'VST' (Varrio Sureno Town or Varrio Sureno Treces) or 'VSL' (Varrio Sureno Locos) member;

"(b) Drinking alcoholic beverages in public excepting consumption on lawfully licensed premises, or using drugs;

"(c) Possessing any weapons including but not limited to knives, dirks, daggers, clubs, nunchukas, BB guns, concealed or loaded firearms, and any other illegal weapons as defined in the California Penal Code, and any object capable of inflicting serious bodily injury including but not limited to the following: metal pipes or rods, glass bottles, rocks, bricks, chains, tire irons, screwdrivers, hammers, crowbars, bumper jacks, spikes, razor blades[,] razors, sling shots, marbles, ball bearings;

"(d) Engaging in fighting in the public streets, alleys, and/or public and private property;

"(e) Using or possessing marker pens, spray paint cans, nails, razor blades, screwdrivers, or other sharp objects capable of defacing private or public property;

"(f) Spray painting or otherwise applying graffiti on any public or private property, including but not limited to the street, alley, residences, block walls, vehicles and/or any other real and personal property;

"(g) Trespassing on or encouraging others to trespass on any private property;

"(h) Blocking free ingress and egress to the public sidewalks or street, or any driveways leading or appurtenant thereto in 'Rocksprings';

"(i) Approaching vehicles, engaging in conversation, or otherwise communicating with the occupants of any vehicle or doing anything to obstruct or delay the free flow of vehicular or pedestrian traffic;

Appellants challenge the power of the trial court to issue an injunction they claim is unauthorized either by

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"(j) Discharging any firearms;

"(k) In any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings', or any other persons who are known to have complained about gang activities, including any persons who have provided information in support of this Complaint and requests for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction;

"(l) Causing, encouraging, or participating in the use, possession and/or sale of narcotics;

"(m) Owning, possessing or driving a vehicle found to have any contraband, narcotics, or illegal or deadly weapons;

"(n) Using or possessing pagers or beepers in any public place;

"(o) Possessing channel lock pliers, picks, wire cutters, dent pullers, sling shots, marbles, steel shot, spark plugs, rocks, screwdrivers, 'slim jims' and other devices capable of being used to break into locked vehicles;

"(p) Demanding entry into another person's residence at any time of the day or night;

"(q) Sheltering, concealing or permitting another person to enter into a residence not their own when said person appears to be running, hiding, or otherwise evading a law enforcement officer;

"(r) Signal[l]ing to or acting as a lookout for other persons to warn of the approach of police officers and soliciting, encouraging, employing or offering payment to others to do the same;

"(s) Climbing any tree, wall, or fence, or passing through any wall or fence by using tunnels or other holes in such structures;

"(t) Littering in any public place or place open to public view;

[continued on next page]

the STEP Act or by civil nuisance law. They also argue the injunction is an impermissible prior restraint on their First Amendment rights of speech and association, and is unconstitutionally vague and overbroad. We will examine these arguments seriatim.

I. The STEP Act

Appellants first argue that the STEP Act (Act), was the true basis on which respondent and the trial court relied for this injunction, but that such an injunction is not authorized by the statute, which cannot enjoin street gang activity of the kind, or in the area described in the complaint. They also contend the Act was intended to preempt the general nuisance and injunction provisions of the Civil Code and the Code of Civil Procedure and

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"(u) Urinating or defecating in any public place or place open to public view;

"(v) Using words, phrases, physical gestures, or symbols commonly known as hand signs or engaging in other forms of communication which describe or refer to the gang known as 'VST' or 'VSL' or in any way serving to further or facilitate the nuisances and crimes committed by the gang known as 'VST' or 'VSL' as described in this Complaint or any of the accompanying pleadings or declarations;

"(w) Wearing clothing which bears the name or letters of the gang known as 'VST' or 'VSL';

"(x) Making, causing, or encouraging others to make loud noise of any kind, including but not limited to yelling and loud music at any time of the day or night.

"(y) This injunction shall expire one year from today's date or upon the granting or denial of a permanent injunction, whichever shall occur first."

that, since it was enacted recently, and the public nuisance law was enacted in 1872, the more recently enacted law should be given governing effect. In addition, they argue that the use of the STEP Act was constitutionally impermissible as infringing on their freedom of association. Last, they contend that even if the STEP Act applies, respondent failed to show that each defendant committed one of the felonies referred to in Penal Code section 186.22a.

Respondent does not argue that the STEP Act authorizes the injunction. It contends instead that it used the definitions in the Act to demonstrate the propriety of the injunction, but based its complaint only on public nuisance law. We need not, therefore, reach the issue of the Act's applicability. Even if, as appellants suggest, the trial court relied on the Act in error, its decision may nonetheless be affirmed. We will uphold a judgment if it is correct for any reason " 'regardless of the correctness of [its] grounds. . . . ' 'It is judicial action and not judicial reasoning which is the subject of review. . . . ' " (*United Pacific Ins. Co. v. Hanover Ins. Co.* (1990) 217 Cal.App.3d 925, 933; 9 Witkin, Cal. Procedure (3d ed. 1985), § 259, p. 266.)

Neither do we agree that the STEP Act is the exclusive means of enjoining street gang activity. Appellants rely on the principles of statutory construction in support of this argument, but we need look no further than the language of the Act to make this determination. (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238.) In examining statutory language, courts are to give the words their ordinary, everyday meaning. (*Ibid.*) If the meaning is unambiguous, the language controls. (*Id.* at p.

1239.) Penal Code section 186.22a, subdivision (d) provides that "Nothing in this chapter shall preclude any aggrieved person from seeking any other remedy provided by law." This plain language expressly contemplates the use of any other applicable means, statutory or otherwise, to abate gang activity. Nothing in the Act prohibits other statutory or common law remedies from being utilized. And as we shall see, public nuisance law provides an available alternative.

II. Public Nuisance Law

To view the injunction's use of public nuisance law in context, we first examine its genesis. Dean Prosser, in the Restatement of Torts, Second, encapsulates its history as follows: At common law, "public nuisance" described a large and diverse group of minor criminal offenses, all interfering with the interests of the community at large; public health, public safety, public morals, public peace and public comfort. These interferences were so unreasonable as to constitute crimes, in addition to constituting torts. Most states have since enacted statutes providing criminal penalties for public nuisance without defining the term with any, or much specificity, in addition to enacting statutes declaring specific "conduct or conditions" to be public nuisances. (Rest. 2d, § 821B, at pp. 87-92; see also, e.g., *CEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306.)

"[A] public nuisance is always a criminal offense. . . . [A]ny conduct that is found to be a public nuisance is for that reason a criminal offense, either at common law or

under statute." (Rest.2d Torts, *supra*, § 821B, p. 89.) Conduct becomes a public nuisance when there is an interference with a right common to all members of the public. (Rest.2d Torts, supra; Prosser & Keeton, Torts (5th ed. 1984), §§ 86 at p. 618 and 90 at pp. 643-646; see also *Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 100, fn. 4.)

In California, Penal Code section 370, enacted in 1872, defines a public nuisance as "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, . . . " Civil Code section 3480 defines a public nuisance as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (See also *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116.)

Historically, the remedies for a public nuisance were prosecution as a criminal offense, or a suit brought on behalf of the state or public authority to abate or enjoin the nuisance. (Rest.2d, § 821C, at p. 94.) Civil Code section 3494, authorizes "any public body or officer" to abate a public nuisance. (See *People v. Wheeler* (1973) 30 Cal.App.3d 282.) Civil Code section 3491, defines the statutory remedies for a public nuisance in California as indictment or information, a civil action, or abatement.

Both California statutory and common law definitions of public nuisance law, and the remedies for such a

nuisance, thus appear to be applicable to abate the criminal activity which was interfering with the Rocksprings' residents' use and enjoyment of their homes and streets. Thus, those provisions in the injunction which enjoin *only* criminal conduct – its prohibitions on drinking, using drugs, fighting, vandalism, trespassing, blocking ingress and egress, discharging firearms, demanding entry, littering, and urinating and defecating in public (paragraphs (b), (d), (f), (g), (h), (j), (p), (t), and (u)) – may appropriately be enjoined under public nuisance law.

III. Constitutionality

Having concluded that the criminal conduct in the injunction is properly prohibited under public nuisance law, we turn to the other provisions of the injunction to determine if they survive constitutional scrutiny.[2] Appellants contend that the injunction imposes an impermissible burden on First Amendment rights; that it is overbroad; and that it is vague. Since "[t]he California public nuisance statutes must be enforced in such a way as to operate in a constitutional fashion" (*People ex rel. Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, cert. den. sub nom., *Van de Kamp v. Projection Room Theater* (1976) 429 U.S. 922), we will examine the injunction's

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[2] At the June 28 hearing, respondents presented evidence that the preliminary injunction issued on March 10 had been extremely successful in ridding Rocksprings of the gangs' presence and activities. While this result may be laudable, it does not resolve the underlying issue of the constitutionality of the tool used to achieve it.

provisions to determine if they accord with constitutional guarantees.[3]

A. First Amendment

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (*Texas v. Johnson* (1989) 491 U.S. 397, 414, citations omitted.) This constitutional principle is so tightly woven into the fabric of our national identity that, as Justice Brandeis observed over six decades ago, "Fear of serious injury cannot alone justify suppression of free speech and assembly." (*Whitney v. California* (1926) 274 U.S. 357, 376.) Governmental interference with the right of free speech and expression cannot be condoned even when the wise listener would be moved to counsel the imprudent speaker to "[m]end your speech a little, lest you may mar your fortunes." (William Shakespeare, King Lear, Act I, Scene i, l. 96.)

Hence, "The First Amendment generally prevents government from proscribing speech [citation], or even expressive conduct [citation], because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." (*R.A.V. v. City of St. Paul, Minnesota* (1992) ___ U.S. ___, 112 S.Ct. 2538, 2542, citations omitted; *Texas v. Johnson, supra,* 491 U.S. at p. 414.)

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[3] Respondent makes a number of constitutional arguments vis-a-vis several of the injunction's provisions. For simplicity, we will group the offending provisions under only one heading.

We must also be mindful, as the Supreme Court recently reiterated in *Madsen v. Women's Health Center, Inc.* (1994) ___ U.S. ___, 114 S.Ct. 2516, 2524, of the important differences between an ordinance that criminalizes certain conduct and an injunction such as that before us. As the Supreme Court noted, "[i]njunctions also carry greater risks of censorship and discriminatory application than do general ordinances," and therefore require "somewhat more stringent application of general First Amendment principles." (*Ibid.*) We proceed to review the injunction's provisions with these cautions in mind.

The injunction contains two provisions dealing specifically with speech and with expressive conduct. (See, e.g., *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 294 ["a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative."] It prohibits defendants from "(v) Using words, phrases, physical gestures, or symbols commonly known as hand signs or engaging in other forms of communication which describe or refer to the gang known as 'VST' or 'VSL' . . . " and "(w) Wearing clothing which bears the name or letters of the gang known as 'VST' or 'VSL'." Appellants argue these paragraphs impermissibly infringe on speech and expressive conduct.

What respondent seeks to prevent in these two provisions is unequivocally content-related; it is *only* the speech, symbols, gestures, and hand signs relating to two specific gangs. The First Amendment strictly forbids such restrictions. (*Madsen, supra,* 114 S.Ct. at p. 2523.) Where expressive conduct is restricted because of the content of

the message conveyed, the asserted interests in restricting this expression are subject to " 'the most exacting scrutiny.' " (*Texas v. Johnson, supra,* 491 U.S. at p. 412, quoting *Boos v. Barry* (1988) 485 U.S. 312.)

Respondent claims that any infringement on First Amendment protections is justified by its substantial interest in taking action to protect the residents of the Rocksprings neighborhood. But what, precisely, are the asserted interests here? Respondent does not claim, as the State of Texas did in arguing that its interest in preventing breaches of the peace justified Johnson's conviction for flag desecration (*Texas v. Johnson, supra,* 491 U.S. at p. 407), that the display of the letters VSL or VST on defendants' clothing, or their use of hand signals, gestures, or hand signs will, per se, incite the residents of Rocksprings to violence. No argument is made here that this symbolic conduct is the equivalent of "fighting words," and proscribable per se. (*Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 574.)

As respondent acknowledges in its brief, the injunction was aimed at "abating the conduct of the VSL/VST criminal street gangs within the Rocksprings neighborhood that constitutes a public nuisance." While protecting the quiet enjoyment of the Rocksprings residents in their homes and neighborhood is a laudable goal, "The First Amendment does not permit [a city] to impose special prohibitions on those speakers who express views on disfavored subjects." (*R.A.V., supra,* 112 S.Ct. at p. 2547.)

The Supreme Court in *R.A.V.* invalidated a Bias-Motivated Crime Ordinance, which prohibited the "display of

a symbol which one knows or has reason to know 'arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.' " (*R.A.V., supra,* at p. 2540; *Wisconsin v. Mitchell* (1993) ___ U.S. ___, 113 S. Ct. 2194, 2200.) In *R.A.V.* a juvenile was charged under this ordinance after allegedly "burning a cross on a black family's lawn." (*Ibid.*) The trial court dismissed the charge on overbreadth grounds, and because the ordinance was content-based, but the Minnesota Supreme Court reversed, on the grounds that it applied only to "fighting words," and that it was narrowly tailored to serve a compelling governmental interest in "protecting the community against bias-motivated threats to public safety and order." (*Ibid.*) The United States Supreme Court reversed, concluding that the ordinance was "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." (*Id.* at p. 2542.)

Respondent also cites *Frisby v. Schultz* (1988) 487 U.S. 474, a case in which restrictions on residential picketing were upheld on such a ground, in support of its argument. But the court in *R.A.V.* distinguished *Frisby*, a content-neutral ordinance, from *Carey v. Brown* (1980) 447 U.S. 455, a case in which it had invalidated a residential picketing ban which exempted labor picketing. As the court pointed out, it had upheld reasonable time, place and manner restrictions only when and if they were " 'justified without reference to the content of the regulated speech.' " (*Id.* at p. 2544, citing *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791, and *Clark, supra,* at p. 298.) A facially content-based statute requires that "that weapon be employed only where it is '*necessary* to serve

the asserted [compelling] interest,' . . . " (*Id.* at p. 2549, citing *Burson v. Freeman* (1992) 504 U.S. 191, ___ [112 S.Ct. 1846, 1852]; see also *Madsen, supra,* 114 S.Ct. at p. 2524.)

Respondents have not shown a lack of content-neutral alternatives to these content-based restrictions. (*R.A.V., supra,*) 112 S.Ct. at p. 2550, citing *Boos v. Barry, supra,* 485 U.S. 312, 329). Since they plainly display respondent's "special hostility" towards the message conveyed (*R.A.V., supra,* at p. 2550), they must be invalidated as impermissible infringements on protected First Amendment rights.

B. Vagueness and Overbreadth

To survive a vagueness challenge, due process requires that a statute, or in this case an injunction, be " 'definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt.' " (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 141; see also *Williams v. Garcetti* (1993) 5 Cal.4th 561, 577; *People v. Green* (1991) 227 Cal.App.3d 692, 698.) These requirements are designed to avoid the dangers of arbitrary and discriminatory enforcement. (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109.) Reasonable certainty is all that is required. (*Ibid.*)

Overbreadth is a related but equally onerous constitutional infirmity, defined by the California Supreme Court as follows: "[A]n overbreadth challenge implicates the constitutional interest in due process of law. (U.S. Const., Amends. V, XIV; Cal. Const., art. 1, §§ 7, subd. (a),

24.) The overbreadth doctrine provides that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' " (*Williams v. Garcetti, supra,* 5 Cal.4th 561, 577, quoting *NAACP v. Alabama* (1964) 377 U.S. 288, 307.)

A facial overbreadth challenge can only prevail if appellants demonstrate that the challenged decree " 'could never be applied in a valid manner' or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.' " (*New York State Club Assn. v. New York City* (1988) 487 U.S. 1, 11.) And such a challenge will not succeed unless the injunction is " 'substantially' overbroad, which requires the court to find 'a realistic danger that the [decree] itself will significantly compromise recognized First Amendment protections of parties not before the Court.' " (*Ibid.,* citation omitted.)

"The overbreadth doctrine is 'strong medicine' that is used 'sparingly and only as a last resort.' [Citation.] . . . [A]ppellant must demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally." (*New York State Club Assn., supra,* at p. 14, quoting *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 613; see also *Wisconsin v. Mitchell, supra,* 113 S.Ct. at p. 2201.) "[T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 304.)

We proceed to examine the remaining provisions of the injunction to determine if they are either unconstitutionally vague and/or overbroad.

Paragraph (a): Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant, or any other known VSL or VST member.

We conclude the injunction's first paragraph is both vague and overbroad. Respondents assert that the only reasonable construction of this prohibition is that it requires defendants to know the person is a gang member. This succinctly demonstrates the arbitrary enforcement problem inherent here: Much of the material submitted in support of the injunction documented police identification of gang members. Appellants attest, however, that gang membership is fluid, uncertain, and often claimed by non-members for status reasons. In either case, it is apparent that a defendant could be engaged in one of the activities prohibited in paragraph (a) with a person not known to him or her but known to police as a gang member, and suffer penalties for refusing to obey the injunction as a result. This is a classic case of vagueness. Since this provision also prohibits otherwise protected associational conduct it suffers, in addition, from overbreadth. Both these infirmities require this provision be struck from the injunction.

We are also unpersuaded by respondents' contention that the associational rights at issue here are unworthy of protection. Respondent would have us assume, on the basis of evidence that VSL/VST is a "criminal street

gang" as defined in Penal Code section 186.22, subdivision (f), that all associational activities by gang members are either illegal or unprotected. But as it acknowledges, the STEP Act was carefully drafted to provide enhanced punishments for assisting in felonious criminal conduct committed by members of such a gang while recognizing lawful associational rights. The Legislature explicitly recognized in Penal Code section 186.21 that "It is not the intent of this chapter to interfere with the exercise of the constitutionally protected rights of freedom of expression and association." Mere membership in a street gang is not a crime. (*People v. Green, supra,* 227 Cal.App.3d 692, 699.) And noncriminal associational conduct by VSL/VST members cannot be enjoined solely on the basis of this membership alone.

Paragraph (c): Possessing any weapons including those enumerated in Penal Code section 12020 and any object capable of inflicting serious bodily injury.

The latter part of paragraph (c) also suffers from overbreadth. In addition to forbidding the possession of a list of weapons contained in Penal Code section 12020, it also prohibits possession of "any object capable of inflicting serious bodily injury including but not limited to the following: . . . " The ensuing list includes, inter alia, crowbars, marbles, and ball bearings, all items which have legitimate, non-criminal uses. By contrast, the items in the first part of the list are all defined by the Penal Code as deadly weapons.

While the state has a strong interest in regulating weapons possession, this latter list is the equivalent of decreeing an entire class of otherwise innocent tools, and

toys, to be considered deadly weapons only when in the hands of defendants. Paragraph (c), therefore, survives only to its definitional end, "as defined in the California Penal Code."

Paragraphs (e) and (f): Using or possessing sharp objects capable of defacing property; and spraypainting or applying graffiti.

These two paragraphs must be considered together. Paragraph (f) enjoins "[s]pray painting or otherwise applying graffiti on any public or private property, . . . " the crime of vandalism (Pen. Code, § 594, et seq.), and is enjoinable as a public nuisance. Paragraph (e), however, enjoins in addition the use or possession of potential means of applying graffiti, including "marker pens, . . . nails, . . . screwdrivers, or other sharp objects capable of defacing private or public property." Again, these objects have legitimate, non-criminal uses, as do other objects "capable of" defacing property, and their possession and use by defendants, other than for criminal purposes, may not be judicially enjoined. We conclude paragraph (e) is overbroad, and must be struck.

Paragraph (i): Approaching vehicles, encaging in conversation, or otherwise communicating with the occupants of any vehicle, or obstructing or delaying the flow of vehicular or pedestrian traffic.

The prohibition in this paragraph on "Approaching vehicles, engaging in conversation, or otherwise communicating with the occupants of any vehicle" also suffers from overbreadth. It prevents defendants' communicating with the occupants of any vehicle, for any reason

whatever. This includes, as appellants point out, asking a bus driver for a transfer ticket, or even saying "Good morning" to a fellow passenger.

What respondents are clearly attempting to prohibit in (i) drive-by drug dealing – could be prevented by enjoining that conduct alone, without reaching into the area of protected rights of speech and association. This provision must consequently be struck from the injunction.

Paragraph (k): Confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting, battering residents, patrons, or visitors to Rocksprings, or persons known to have complained about gang activity or provided information in support of the complaint.

This provision suffers from two infirmities; first, it does not sufficiently define "confront," "intimidate," "annoy," "provoke," "challenge" or "harass" so as to provide a standard of conduct for those whose activities are proscribed. (*Grayned, supra,* 408 U.S. at p. 108.) Second, like paragraph (a), it also speaks of persons "known" to have complained about gang activities, without indicating how or whether a defendant is to be charged with this knowledge. This presents, again, the specter of arbitrary enforcement. Both these infirmities come under the broad rubric of vagueness.

Respondent argues this type of provision is similar to those authorized by Code of Civil Procedure section 527.6 to prevent harassment. (See, e.g., *Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105.) "Harassment," however, is specifically defined in Code of Civil Procedure section

527.6, subdivision (b). This, and the procedural due process protections in subsequent subdivisions, which require, inter alia, a hearing, and proof of harassment based on clear and convincing evidence, vitiate the constitutional problems presented by the undefined and judicially enjoined conduct here.

This paragraph may be saved in part, however: threatening and assaultive behavior, as defined in the Penal Code, may properly be enjoined against anyone in this neighborhood under public nuisance law.

Paragraph (l): Causing, encouraging or participating in the use, possession or sale of narcotics.

"Causing," "encouraging," and "participating" are ill-conceived terms that suffer both from vagueness and overbreadth. A defendant advocating the legalization of marijuana, for instance, could conceivably be penalized for exercising his or her protected First Amendment rights under this language. It is also unclear whether participation is the same as, or different from, possession or use. Hence, these terms must be struck.

The rest of this paragraph, which enjoins the use, possession and sale of narcotics, and is a criminal offense, may properly be enjoined under public nuisance law.

Paragraph (m): Owning, possessing, or driving a vehicle found to have any contraband, narcotics, or illegal or deadly weapons.

While possessing contraband, narcotics, or illegal or deadly weapons is clearly enjoinable under public nuisance law, the proscription on owning, possessing or

driving a vehicle "found to have" (presumably by police) one of the items prohibited by this paragraph is impermissibly vague. First, it is unclear from this language whether it prohibits the vehicle, or its occupant(s) from possessing contraband, drugs, or weapons. If the latter, it conceivably metes out additional punishment for what is already a criminal act. If the former, does it require the occupant to be aware that the vehicle contains the prohibited items?

This paragraph presents both the spectre of arbitrary enforcement – of police stopping vehicles with the knowledge or suspicion that its occupants have violated this proscription – and also raises procedural due process concerns if its intent, or effect, is to deprive defendants of ownership or possession of their vehicles. This paragraph is thus void for vagueness.

Paragraph (n): Using or possessing beepers in any public place.

This proscription is evidently intended to prevent activity in aid of the rampant, drive-by drug-dealing which characterized gang activity in the Rocksprings neighborhood prior to the injunction's issuance. Nonetheless, it is too broad to withstand constitutional scrutiny. Respondents have not shown that curtailment of this activity cannot be achieved by narrower means. Thus, this provision must also be struck.

Paragraph (o): Possession of instrumentalities capable of being used to break into locked vehicles.

The vagueness and overbreadth in this provision are self-evident. Many of the listed instrumentalities, including pliers, screwdrivers and spark plugs have legitimate uses, particularly by those who drive cars. If the possession of marbles is enjoinable on such a ground, why not a baseball? The dangers of arbitrary enforcement, and the concomitant intrusion on innocent activities, are too obvious to ignore. This provision does not survive constitutional scrutiny.

Paragraph (q): Sheltering, concealing or permitting another person to enter into a residence not their own when said person appears to be running, hiding, or otherwise evading a law enforcement officer

This paragraph also suffers from vagueness. "Sheltering" is undefined. And who decides whether a person "appears to be" evading law enforcement? The possibility of arbitrary enforcement renders this paragraph impermissibly vague.

Paragraph (r): Signalling to or acting as a lookout for other persons to warn of the approach of police officers and soliciting, encouraging, employing or offering payment to others to do the same.

This paragraph fails to define "signalling." It also fails to explain how police will distinguish between those activities designed to alert defendants to police presence, and those which might have other, innocent intentions. It thus suffers from vagueness.

Paragraph (s): Climbing any tree, wall or fence, or passing through any wall or fence using tunnels or other holes in such structures.

Like paragraph (n), this paragraph suffers from overbreadth in its assumption that otherwise innocent activities, engaged in by defendants, become means to criminal ends. Since it potentially involves trespassing, which is properly enjoined in paragraph (g), we see no need to validate such a "meat cleaver" approach to gang activity in Rocksprings.

Paragraph (x): Making, causing, or encouraging others to make loud noises of any kind, at any time of the day or night.

How loud is loud? Does it include talking above a whisper? Does it have to bother, or interfere with the quiet enjoyment of a Rocksprings resident? Does it include playing a car radio or stereo at any volume? The lack of a standard of proscribed conduct here, and the danger of interfering with protected freedoms again dooms this provision as both vague and overbroad.

C. Summary

To encapsulate our previous discussions, paragraphs (b), (d), (f), (g), (h), (j), (p), (t), and (u) all survive as enjoinable criminal activities under public nuisance law. Paragraphs (a), (e), (i), (m), (n), (o), (q), (r), (s), (v), (w), and (x) are all constitutionally impermissible. And paragraphs (c), (k) and (l) all survive in part, consistent with constitutional limitations.

IV. Defendants

In light of our conclusion that parts of the injunction must be upheld, we must now address appellants' remaining argument that as to six of the named defendants, there has been no adequate showing that they are active gang members. These defendants are Blanca Gonzalez, Jorge Gonzalez, Ebarardo Cervantes, Miguel Lopez, Miguel Moreno and Rafael Ruiz. We will first summarize the evidence presented by respondents against these six defendants.

A. Blanca Gonzalez

On May 20, 1992, an officer stopped a car driven by Ms. Gonzalez, apparently because it had been cruising in an area of open conflict between Norteno and Sureno gangs. She and her passengers were all dressed in Sureno-style clothing, and she and two passengers claimed gang membership. Ms. Gonzalez told the officer she claimed VST and VCT (Varrio Colonio Treces) membership.

On October 31, 1992, another officer on foot patrol in Rocksprings encountered Ms. Gonzalez and another young woman. They told the officer they did not live in Rocksprings, and that they were members of VSL.

B. Jorge Gonzalez

On September 25, 1992, police officers stopped a car driven by Mr. Gonzalez for a mechanical violation. Mr. Gonzalez told the officers he was a member of VSL, and on parole from the California Youth Authority (CYA) for

an assault with a deadly weapon conviction. After the officers obtained Mr. Gonzalez's consent to search the car, they found three bags of cocaine and three bags of marijuana under a seat. All four passengers also claimed gang membership.

On January 8, 1993, in response to a report of a gang-related disturbance in Rocksprings, an officer approached a group of young men at the scene, including Mr. Gonzalez, to obtain information about the incident. All three were dressed in Sureno colors and styles, and claimed VSL membership.

C. Eberardo Cervantes

On December 21, 1992, officers observed two suspects, one of whom was Eberardo Cervantes, selling illegal drugs on the corner of Nordale and Welch in Rocksprings. The two were arrested, and four bags of marijuana and one baggie of cocaine were retrieved. Mr. Cervantes told the officers he claimed VST membership. The two suspects were subsequently prosecuted for possession for sale and sales of marijuana and cocaine.

On May 5, 1993, officers were investigating a gang-related homicide in which a woman Norteno gang member was shot while riding as a passenger in a car with other Nortenos. One of the field interview cards given to the officer for follow-up was one for "Eduardo Dominguez;" the officer recognized this individual as Mr. Cervantes, who had escaped from Boy's Ranch about two weeks earlier. Confronted, Mr. Cervantes acknowledged his identity, and indicated his VST membership.

D. Miguel Lopez

On January 15, 1992 officers conducting surveillance in Rocksprings observed several drug sales conducted by Mr. Lopez and another young male. Neither lived in Rocksprings. Mr. Lopez told officers he was a VSL member; he had a 3-dot tattoo on his left hand.

On July 17, 1992, Mr. Lopez was a passenger in a car stopped by an officer in Rocksprings for a Vehicle Code violation. Mr. Lopez told the officer he was on probation for a burglary conviction and was a VST member.

On September 18, 1992, an officer encountered Mr. Lopez across the street from Yerba Buena High School. A records check showed him to be an escapee from Boys' Ranch. Mr. Lopez told the officer he was a VST member, and showed him a tattoo of this acronym on his stomach and the 3-dot tattoo on his hand.

E. Miguel Moreno

On August 28, 1992, an officer on foot patrol in Rocksprings encountered Mr. Moreno, dressed Sureno-style. He told the officer he lived in the neighborhood, although he could not remember the address, and that he was a VST member.

On October 13, 1992, another officer on foot patrol in Rocksprings observed what appeared to be a drug transaction take place. When he accosted the suspected buyer, he admitted having purchased marijuana. The officer then approached the alleged seller, Mr. Moreno, who had exactly the amount of money the purchaser told the officer he had paid in his possession. The officer determined

Mr. Moreno was truant from high school at the time of this transaction.

F. Rafael Ruiz

Officers responded to a gang-related call on October 1, 1992. The reporting party had told police that several gang members were selling drugs, and were harassing his wife and daughter. Officers saw five young males in the vicinity, one corresponding to the reporting party's description. All five were dressed Sureno-style, and all claimed VST membership. One officer took two photographs of the group, which included Mr. Ruiz.

Appellants argue this evidence is insufficient to demonstrate these defendants are active members in a criminal street gang who devote all or a substantial part of their time and efforts to the gang. We conclude this is not the appropriate test for determining the propriety of their being subject to the injunction, however: In order to be properly named, there must be some connection between the individual defendants and the conduct to be enjoined.

We note again, in beginning this discussion, that mere membership in a street gang is not a crime. (*People v. Green, supra,* 227 Cal.App.3d at p. 699.) "[C]riminal liability may not be predicated on nothing more than membership; i.e., nothing more than some association with a group." (*Ibid.*) As the United States Supreme Court has stated, "In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently

substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment." (*Scales v. United States* (1961) 367 U.S. 203, 224-225.)

"Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. [Fn. omitted.] 'In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." ' " (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 920; *Carroll v. Princess Anne* (1968) 393 U.S. 175, 183-184; see also *Healy v. James* (1972) 408 U.S. 169, 186.)

As these cases demonstrate, even membership in an organization which advocates or engages in illegal activity is not, by itself, grounds for the imposition of punishment. There must be some personal, individual participation in the illegal conduct for that conduct to be restrained (cf. *NAACP, supra,* at p. 924, fn. 67) in order to comply with due process. As respondent acknowledges, and as we have already pointed out, the STEP Act was carefully drafted to impose enhanced criminal liability on active gang members who assist in felonious criminal conduct by their members only under carefully circumscribed conditions. It specifically does not criminalize membership in a gang alone, or non-criminal conduct by gang members.

It is therefore, for all practical purposes, irrelevant whether respondent has shown that these six defendants are, or are not, members of VSL/VST. What matters is if there has been a showing that the conduct they have engaged in is the same, or similar to that conduct which respondent seeks to enjoin. Only thus can due process be served.

Having determined the standard by which the propriety of these appellants' presence in this suit should be judged, the result is self-evident. As to Blanca Gonzalez, no showing has been made that she has done anything other than dress Sureno-style, claim gang membership, and be seen in Rocksprings. This is an inadequate foundation for civil liability. All the other defendants were suspected of participating in, and/or were arrested or prosecuted for activity which is the subject of this injunction – mainly narcotics sales, possession or use. Thus we conclude that five of the defendants at issue were properly named, but Ms. Gonzalez must be dismissed as a defendant.

Disposition

The order authorizing the preliminary injunction is modified consistent with the views discussed herein; as modified, it is affirmed. Each party to bear its own costs on appeal.

Elia, J.

WE CONCUR:

_____
Premo, Acting P.J.

_____
Bamattre-Manoukian, J.

People ex rel Gallo v. Acuna, et al.

H011802

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Hon. Robert M. Foley
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H011802

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CLARA

PEOPLE OF THE STATE OF CALIFORNIA, ex rel., CITY ATTORNEY OF THE CITY OF SAN JOSE, Plaintiffs, vs. CARLOS ACUNA, et al., Defendants.	CASE NO. 729322 ORDER GRANTING PRELIMINARY INJUNCTION (Filed Jun. 28, 1993)

Plaintiff's application for Preliminary Injunction came on regularly for hearing on June 28, 1993, in Department 26 of the Santa Clara County Superior Court, 190 West Hedding Street, San Jose, California, the Honorable Robert Foley presiding. Plaintiff was represented by Senior Deputy City Attorney Carol C. Weinstein. Defendants CARLOS ACUNA, JOSE BRAVO, EBERARDO CERVANTES, MARTIN DAVILA, BLANCA GONZALEZ, JORGE GONZALEZ, JUAN PINEDA HERNANDEZ,

MIGUEL LOPEZ, MIGUEL MORENO, FLAVIO QUINONEZ, and RAFAEL RUIZ, were represented by Patricia Price, Esq., Amanda K. Wilson, Esq., Stuart D. Kirchick, Esq., Edward M. Chen, Esq., Alan L. Schlosser, Esq., Sara T. Campos, Esq., Diane T. Chin, Esq. and Daniel M. Mayfield, Esq.

The Court having considered the papers, evidence and arguments submitted in support of and in opposition to plaintiff's Request for Preliminary Injunction, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

Plaintiff's application for Preliminary Injunction is granted.

Defendants CARLOS ACUNA, JOSE BRAVO, EBERARDO CERVANTES, MARTIN DAVILA, BLANCA GONZALEZ, JORGE GONZALEZ, JUAN PINEDA HERNANDEZ, MIGUEL LOPEZ, MIGUEL MORENO, FLAVIO QUINONEZ, and RAFAEL RUIZ, are hereby immediately enjoined during the pendency of this action from engaging in, committing or performing directly or indirectly any and all of the following acts within the area commonly known as "Rocksprings" and all property therein, including: the 600 block of Nordale Avenue; the 1700 and 1800 blocks of Rocksprings Drive; the 1700 and 1800 block of Welch Avenue; and the 1700 and 1800 blocks of Senter Road; and Needles Drive between Senter Road and Rocksprings Drive (hereinafter "Rocksprings"):

(a) Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant herein, or with

any other known "VST" (Varrio Sureno Town or Varrio Sureno Treces) or "VSL" (Varrio Sureno Locos) member;

(b) Drinking alcoholic beverages in public excepting consumption on properly licensed premises only or using drugs;

(c) Possessing any weapons including but not limited to knives, dirks, daggers, clubs, nunchukas, BB guns, concealed or loaded firearms, and any other illegal weapons as defined in the California Penal Code, and any object capable of inflicting serious bodily injury including but not limited to the following: metal pipes or rods, glass bottles, rocks, bricks, chains, tire irons, screwdrivers, hammers, crowbars, bumper jacks, spikes, razor blades; razors, sling shots, marbles, ball bearings;

(d) Engaging in fighting in the public streets, alleys, and/or public and private property;

(e) Using or possessing marker pens, spray paint cans, nails, razor blades, screwdrivers, or other sharp objects capable of defacing private or public property;

(f) Spray painting or otherwise applying graffiti on any public or private property, including but not limited to the street, alley, residences, block walls, vehicles and/or any other real or personal property;

(g) Trespassing on or encouraging others to trespass on any private property;

(h) Blocking free ingress and egress to the public sidewalks or street, or any driveways

leading or appurtenant thereto in "Rocksprings";

(i) Approaching vehicles, engaging in conversation, or otherwise communicating with the occupants of any vehicle or doing anything to obstruct or delay the free flow of vehicular or pedestrian traffic;

(j) Discharging any firearms;

(k) In any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to "Rocksprings", or any other persons who are known to have complained about gang activities, including any persons who have provided information in support of this Complaint and requests for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction;

(l) Causing, encouraging, or participating in the use, possession and/or sale of narcotics;

(m) Owning, possessing or driving a vehicle found to have any contraband, narcotics, or illegal or deadly weapons;

(n) Using or possessing pagers or beepers in any public place;

(o) Possessing channel lock pliers, picks, wire cutters, dent pullers, sling shots, marbles, steel shot, spark plugs, rocks, screwdrivers, "slim jims" and other devices capable of being used to break into locked vehicles;

(p) Demanding entry into another person's residence at any time of the day or night;

(q) Sheltering, concealing or permitting another person to enter into a residence not their own when said person appears to be running, hiding, or otherwise evading a law enforcement officer;

(r) Signaling to or acting as a lookout for other persons to warn of the approach of police officers and soliciting, encouraging, employing or offering payment to others to do the same;

(s) Climbing any tree, wall, or fence, or passing through any wall or fence by using tunnels or other holes in such structures;

(t) Littering in any public place or place open to public view;

(u) Urinating or defecating in any public place or place open to public view;

(v) Using words, phrases, physical gestures, or symbols commonly known as hand signs or engaging in other forms of communication which describe or refer to the gang known as "VST" or "VSL" or in any way serving to further or facilitate the nuisances and crimes committed by the gang known as "VST" or "VSL" as described in this Complaint or any of the accompanying pleadings or declarations;

(w) Wearing clothing which bears the name or letters of the gang known as "VST" or "VSL";

(x) Making, causing, or encouraging others to make loud noise of any kind, including but not limited to yelling and loud music at any time of the day or night.

IT IS SO ORDERED.

(y) This injunction will expire one year from today's date or upon the granting or denial of a permanent injunction, whichever shall occur first.

DATED: 6/28/93

/s/ Robert M. Foley
HONORABLE
ROBERT FOLEY
Judge of the Superior Court

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CLARA

PEOPLE OF THE STATE OF CALIFORNIA, ex rel., CITY ATTORNEY OF THE CITY OF SAN JOSE, Plaintiff, vs. CARLOS ACUNA (aka FLACO), et al., Defendants.	NO. 729322 **ORDER MODIFYING PRELIMINARY INJUNCTION** (Filed Jun. 24, 1994)

Plaintiff's Ex Parte Application for Order Modifying Preliminary Injunction came before this Court on June 24, 1994, in Department 31 of the Santa Clara County Superior Court, Hall of Justice, 190 West Hedding Street, San Jose, California, the Honorable Robert Foley presiding. Plaintiff was represented by Senior Deputy City Attorney Carol C. Weinstein. Defendants Carlos Acuna, Jose Bravo, Eberardo Cervantes, Hassan Davila, Blanca Gonzales, Jorge Gonzalez, Juan Pineda Hernandez, Miguel Lopez,

Miguel Moreno, Flavio Quinonez and Rafael Ruiz were represented by counsel.

The Court having considered plaintiff's Ex Parte Application for Order Modifying Preliminary Injunction and defendants' position with respect to said application, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

Plaintiff's Ex Parte Application for Order Modifying Preliminary Injunction is granted. The Order Granting Preliminary Injunction on file herein is hereby modified to extend in duration, under its original terms, until said time that a Permanent Injunction is either granted or denied.

This Order is made without prejudice to either plaintiff or defendants to make any future application to this Court in this regard, in the event of changed circumstances or changed status of this matter.

This Order applies to defendants Carlos Acuna, Jose Bravo, Eberardo Cervantes, Hassan Davila, Blanca Gonzales, Jorge Gonzalez, Juan Fineda Hernandez, Miguel Lopez, Miguel Moreno, Flavio Quinonez and Rafael Ruiz.

IT IS SO ORDERED.

DATES: JUN 24 1994

ROBERT M. FOLEY
HONORABLE ROBERT FOLEY
Judge of the Superior Court

TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, EX REL., CITY ATTORNEY OF THE CITY OF SAN JOSE,

PLAINTIFFS, RESPONDENTS,

-vs-

CARLOS ACUNA, ET AL.,

DEFENDANTS, APPELLANTS.

[PARTIAL] REPORTER'S TRANSCRIPT ON APPEAL
FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, IN AND FOR
THE COUNTY OF SANTA CLARA
HONORABLE ROBERT M. FOLEY, JUDGE
JUNE 28, 1993

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* * *

[p. 29] THE COURT: CERTAINLY THIS IS A NOVEL ACTION AND CERTAINLY THE STATUTE

INVOLVED IS SOMEWHAT NOVEL. WHEN WE NORMALLY THINK OF A PUBLIC NUISANCE WE THINK OF A PARTICULAR PLACE THAT IS USED IN SUCH A FASHION AS TO INTERFERE WITH THE RIGHTS OF OTHER INDIVIDUALS. THIS PARTICULAR STATUTE IS WORDED IN SUCH A FASHION TO CATCH WITHIN ITS SWEEP NOT ONLY A SITUATION LIKE I DESCRIBED, BUT IT ALSO REFERS TO ANY PLACE WHEREIN OR UPON WHICH THAT CRIMINAL CONDUCT BY GANG MEMBERS TAKES PLACE.

I THINK ANY FAIR READING OF THAT LANGUAGE WOULD INDICATE THIS FOUR BLOCK AREA, GIVEN THE EVIDENTIARY SHOWING THAT THE CITY ATTORNEY HAS MADE, COMES WITHIN THAT DEFINITION.

THE INJUNCTION ITSELF IS FASHIONED IN A WAY AS TO PROHIBIT THE CONDUCT WITHIN THE AREA THAT GIVES RISE TO THE NUISANCE. AND ALTHOUGH IT MAY ON IT'S FACE IMPACT CERTAIN ASSOCIATION RIGHTS, IT WEIGHS UPON THEM NO MORE HEAVILY THAN IS ABSOLUTELY NECESSARY IN ORDER TO REFORM THE PROPERTY.

I THOUGHT MONTHS AGO THE INJUNCTION SHOULD ISSUE AND I CONTINUE TO BE OF THAT BELIEF. THE INJUNCTION SHALL [p. 30] ISSUE AGAINST THE FIVE REMAINING DEFENDANTS AND THE MOTION TO VACATE THE INJUNCTION AS TO SIX NAMED DEFENDANTS IS RESPECTFULLY REFUSED.

THE PRELIMINARY INJUNCTION SHALL EXPIRE ON ITS OWN TERMS ONE YEAR HENCE OR UPON

FULL HEARING OF THE CASE AND THE ISSUANCE OR DENIAL OF A PERMANENT INJUNCTION, WHICHEVER SHALL OCCUR FIRST.

YOU WANT TO SET THE MATTER FOR TRIAL OR DO YOU WANT TO GO THROUGH THE NORMAL PROCEDURE AT-ISSUE MEMO?

MS. WEINSTEIN: I WOULD LIKE TO GO THROUGH THAT PROCEDURE, IF POSSIBLE.

JUST A SIDE ISSUE, I DO HAVE AN ORDER GRANTING PRELIMINARY INJUNCTION THAT I HAVE PREPARED WHICH I CAN SHOW TO COUNSEL WHICH I WOULD PREFER TO HAVE EXECUTED NOW SO THAT WE CAN HAVE COUNSEL ACCEPT SERVICE ON BEHALF OF THE DEFENDANTS, IF THEY WOULD BE WILLING TO DO SO. I DO HAVE THE ELEVEN NAMED DEFENDANTS IN THAT ORDER.

MAY I APPROACH?

THE COURT: YES, WOULD YOU? I WOULD LIKE TO READ IT.

YOU ARE ASKING ME TO SIGN IT?

MS. WEINSTEIN: YES.

THE COURT: THEN I WOULD LIKE TO READ IT.

(BRIEF PAUSE)

THE COURT: WITH ONE MODIFICATION I'LL SIGN IT. THE MODIFICATION BEING SUBDIVISION B, DRINKING ALCOHOLIC BEVERAGES IN PUBLIC, EXCEPTING THEREFROM CONSUMPTION UPON

PROPERLY LICENSED PREMISES. WITH THAT MODIFICATION I'LL [p. 31] SIGN THE PRELIMINARY INJUNCTION.

MS. WEINSTEIN: THANK YOU, YOUR HONOR.

I'M WONDERING WHETHER I SHOULD ALSO PUT IN THE TERM ABOUT THE ONE YEAR EXPIRATION OR IF THAT'S NECESSARY.

THE COURT: YES.

WITH THOSE MODIFICATIONS I HAVE SIGNED THE INJUNCTION.

MS. WEINSTEIN: THANK YOU, YOUR HONOR. AND I WOULD WONDER IF COUNSEL WOULD JUST INDICATE THAT THEY ARE ACCEPTING SERVICE ON BEHALF OF ALL ELEVEN DEFENDANTS.

MR. KIRCHICK: YOUR HONOR, WE WOULD BE MORE THAN HAPPY TO ACCEPT SERVICE ON BEHALF OF THOSE DEFENDANTS THAT ARE NOT IN CUSTODY THAT WE HAVE PERSONAL CONTACT WITH.

THE COURT: VERY GOOD. SO SOMETHING FOR THE RECORD.

MS. WEINSTEIN: THAT WOULD BE ALL DEFENDANTS THAT ARE NOT IN CUSTODY; CORRECT?

MR. KIRCHICK: CURRENTLY, CORRECT.

THE COURT: THANK YOU VERY MUCH.

THE ISSUE, AS I SAID, IS A NOVEL ONE, WELL BRIEFED THOUGH BY BOTH SIDES. I APPRECIATE YOUR HELP.

MR. KIRCHICK: THANK YOU, YOUR HONOR.

(WHEREUPON, PROCEEDINGS WERE CONCLUDED.)

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CLARA

PEOPLE OF THE STATE OF CALIFORNIA, ex rel., CITY ATTORNEY OF THE CITY OF SAN JOSE, Plaintiffs, vs. CARLOS ACUNA, et al, Defendants.	Case No. 729322 DECLARATION OF MICHAEL LLOYD

I, MICHAEL LLOYD, declare as follows:

1. I have been employed by the San Jose Police Department for the past five (5) years. Prior to this, I was a San Jose Reserve Police Officer for five (5) years. During the period of January, 1992 through July, 1992, I was assigned to the department's Narcotics Enforcement Team (NET), a specialized uniformed patrol unit that targets street-level drug violations.

2. I have received formal training on criminal street gangs at both the Police Academy and at the department's yearly Continuing Professional Training (CPT). I attended a forty (40)-hour NET Academy, four (4) hours of which was devoted to the subject of criminal street gangs. I also attended a twenty-four (24)-hour gang seminar sponsored by the Department of Justice.

3. I have had extensive contact with members of criminal street gangs, both in my experience working patrol, and during the time that I was assigned to NET. I am familiar with the "Rocksprings" area of San Jose, because it was an area with a high level of gang and drug activity. I had frequent contact with the "Rocksprings" area both while performing patrol duties and while assigned to NET.

4. On March 23, 1991, I was working day patrol on the east side of San Jose. I was in the area of the "7-11" store at El Rancho Verde and McKee, working foot patrol, due to the high level of illegal narcotics and gang activities in the area. I saw two young, hispanic males loitering outside the "7-11" store. They were wearing blue bandanas or "rags" outside of their pants pockets, a common practice of criminal street gang members, known as "flying colors." I spoke to them, and asked them if they were members of a gang. They told me that, yes, they were Surenos, but did not tell me which specific affiliation they claimed. One of the two identified himself as Hassan Davila.

I filled out field interview cards on both of them, copies of which are attached as Exhibit "A". I have

blacked out identifying information on the second individual, because it is my understanding that he is not a party to the gang abatement action. Otherwise, Exhibit "A" is a true and correct copy of the field interview cards I completed. I noted on the field interview cards that both individuals were wearing blue "rags." I also denoted their Sureno gang association with the number "13," which signifies Sureno criminal street gangs.

5. On May 20, 1992, while assigned to NET, I made a vehicle stop in the area of Crucero and Tami Lee in San Jose. There was a young, hispanic female driver and two young, hispanic female passengers in the car. The driver identified herself as Blanca Gonzales. Ms. Gonzales was wearing a black top and black jeans. One of the female passengers was wearing a blue tank top and gray sweat pants. Their clothing was consistent with members of Sureno criminal street gangs, because of the blue, black and gray clothing. Blue is the trademark color of Surenos, who also favor black, gray, white and other neutral colors, and disfavor the color red, which is associated with rival Nortenos. The driver, Blanca Gonzales, had been cruising in the area, circling up and down the street repeatedly. This caused me concern, because at that time there was a lot of open conflict in the area between members of rival Norteno and Sureno criminal street gangs. The neighborhood where the women were cruising was very close to a Norteno dominated area.

6. I asked the three women if they claimed gang membership. they told me that they did. Blanca Gonzales told me that she belonged to "VST," and "VCT", also known as "Varrio Colonio Treces". Members of these two Sureno criminal street gangs often associate with one

another. One female passenger also claimed "VST" and "VCT" memberships. The third female claimed membership in "VST" and "VSL". I documented this information on field interview cards that I completed for each woman, copies of which are attached as Exhibit "B". I have blacked out identifying information on the two (2) passengers, because it is my understanding that they are not parties to the gang abatement action. Otherwise, Exhibit "B" is a true and correct copy of the field interview cards I completed.

I declare under penalty of perjury that the foregoing is true and correct. As to those matters alleged on information and belief, I am informed and believe them to be true and correct. This declaration was executed on this 18 day of June, 1993, at San Jose, California.

/s/ Michael Lloyd 2636
MICHAEL LLOYD

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CLARA

PEOPLE OF THE STATE OF CALIFORNIA, ex rel., CITY ATTORNEY OF THE CITY OF SAN JOSE, Plaintiffs, vs. CARLOS ACUNA, et al., Defendants.	CASE NO. 729322 DECLARATION OF DAVE STORTON

I, DAVE STORTON, declare as follows:

1. I have been employed as a Police Officer for the San Jose Police Department for the past approximately eight (8) years. During the time period of July, 1992 through March, 1993, I was assigned to day shift patrol duties in District "L." District "L" includes the area commonly known as "Rocksprings."

2. Before my assignment to District "L" patrol, I was an undercover officer for Narcotics Covert Investigations ("NCI") for three (3) years. In addition to on-the-job experience, I have received training in the identification of criminal street gangs and their members, and enforcement of laws relating to criminal street gangs, at the Police Academy, at the department's yearly Continuing Professional Training (CPT), and at departmental training programs offered on an intermittent basis by the department's Violent Crimes Unit (VCU), on the subject of criminal street gangs. I have received departmental training on subjects including the identification of gang activities, structures, symbols and practices. I have spoken with numerous gang members and I have arrested numerous gang members for criminal conduct. I have investigated many gang related crimes. I receive continuous updates on gang activity from the Police Department's Violent Crimes Unit, whose members investigate gang related crimes.

3. During the course of my patrol duties in District "L", I became aware of and familiar with a criminal street gang known under the various names of "VSL" and "VST." "VSL" and "VST" are separate and distinct monikers, but they act, associate and are known as essentially one gang. Gang members claiming either "VSL" or "VST," or both, associate with each other and support one another. Most of the members of the gang used to hang out in the residential area known as "Rocksprings", and at the Happy Hollow Market which is located adjacent to this neighborhood. The gang used to claim its "varrio" or "turf," in "Rocksprings".

4. At the current time, I would estimate that there are a total of about 150 "VSL"/"VST" gang members in San Jose. The gang members wear blue, which is associated with Southern California or "Sureno" gangs. The gang members will often wear L.A. Kings or L.A. Raider's paraphernalia to identify themselves with stronger Los Angeles gangs. The gang's symbol is the number "thirteen" and this symbol is tattooed on many gang members in the various forms of "XIII" or "X3", or "13". Thirteen signifies Southern California, so it is another way that "VSL"/"VST" gang members associate themselves with the stronger Southern California gangs. Many times the numeric symbol "13" is abbreviated as "3." Sureno gang members do hand signs flashing three (3) fingers to show their Sureno affiliation.

5. Most of the Sureno gang members who used to hang out in "Rocksprings" did not live in that area. Gang members would either ride the bus, walk, or drive into the area with other gang members. I would often conduct foot patrols in the "Rocksrpings" area to maintain police visibility, in an effort to discourage criminal activity. I would speak to the people who were hanging around the neighborhood with no apparent purpose. Often they would freely tell me of their gang associations. Gang members hanging around "Rocksprings" were often drunk or "high" in public. They routinely dealt drugs, primarily marijuana and cocaine in the powder form. Painting graffiti with gang monikers and symbols was a common gang pastime in the "Rocksprings" neighborhood. "VSL"/"VST" gang members used to hang around

on the street, almost continually. They claimed "Rocksprings" as their "varrio," or "turf" before the gang abatement cleared them out of that area.

6. "VSL"/"VST" gang members range in age from about 14 to 23 years. There are several female gang members. Most "VSL"/"VST" gang members are hispanic. Several "VSL"/"VST" gang members used to regularly approach me and talk to me while I was on routine patrol in "Rocksprings." Many gang members told me about their cocaine use and their use of other illegal drugs, and about their fights with rival gang members. In addition, several gang members proudly described to me the violent initiation practice that they subject their new members to. This initiation practice is referred to as "jumping in". New members, both young men and young women, are beaten on the first night of their membership in the gang. I had lengthy conversations with a member of "VST," Ricardo Alvarez, one of the gang abatement defendants, who I used to talk to at least once a week while I was working patrol in District "L" during the period of July, 1992 through March, 1993. He frequented the "Rocksprings" area during that time. He told me that "VSL" and "VST" gang members sold drugs on a regular basis as a way of making money, and that they transacted much of their drug deals in "Rocksprings" and another residential neighborhood known as "Walnutwoods."

7. On August 28, 1992, I was on foot patrol in "Rocksprings," at around 11:00 a.m. A young, hispanic male was hanging around in the area, and I spoke with him. He identified himself as Miguel Moreno. I asked him if he lived in the neighborhood. He said he did, on [sic] Rocksprings, but was unable to tell me the street address

where he lived. He said he didn't remember. He was wearing a black "Raiders" shirt and hat. Because he was hanging around in an area where Sureno gang members claimed their turf, unable to provide me with a street address where he lived, and wearing clothing typical of Sureno gang members who frequented the area, I asked him if he was a member of a gang. He told me that he was a Sureno. I asked him which gang he was a member of, and he told me "VST." I completed a field interview card for Miguel Moreno, accurately recording this information. A true and correct copy of the field interview card I completed for Miguel Moreno is attached as Exhibit "A." I also asked Miguel Moreno if he minded if I took a picture, something I do for my own personal records to keep with a separate field interview card that I also retain. I do not use these photos for any other purpose than my own information, which often assists me in my enforcement efforts when I work out on the street. I made it clear to him that he was not required to have his picture taken. I did not detain him and he was free to leave if he so chose. He said I could take his picture. He was cooperative and offered information openly during the time that I spoke with him. I did not cite him or place him under arrest.

8. On September 18, 1992, at about 1:30 p.m., I responded to a radio dispatched request for assistance from San Jose Police Officer Tod Lobdell. Officer Lobdell was working a pay job at Yerba Buena High School, when he saw two juveniles across from the school. He recognized one of them as a student, and sent him back to the school. The other juvenile identified himself as Juan Martinez. Officer Lobdell had apparently seen this juvenile

before, and did not believe that this was his true name. Officer Lobdell took him back to the attendance office, where he was identified as "Miguel Lopez." A records check showed that he was an escapee from the Santa Clara County Boys' Ranch. I transported Miguel Lopez and booked him into juvenile hall. During my contact with Miguel Lopez, I completed a field interview card for him, a true and correct copy of which is attached as Exhibit "B". I asked him if he belonged to a gang. He said that he was a member of "VST." He showed me a tattoo on his stomach of his gang name "VST". He also had a tattoo of three (3) dots on his left hand, indicating to me that he was a Sureno gang member.

9. On October 1, 1992, at around 1:00 p.m., I responded to a radio dispatched citizen call for service involving a report of several gang members selling drugs, and harassing the reporting party's daughter and husband. The reporting party stated that one of the gang members had a gun in his front pants. He was described as a hispanic male, 19-21 years old, 5'5", 160 pounds with a "Raiders" cap, white t-shirt and dark pants, in the area of Nordale Avenue and Senter Road, in "Rocksprings." A true and correct copy of the CAPS log showing the citizen call for service is attached as Exhibit "C." Officer Dave Schaeffer and Officer J.D. Weidner also responded to the call. We saw a group of five (5) young, hispanic males walking in the vicinity of the reported location on Nordale Avenue. One member of the group matched the description provided by the citizen very closely. He was approximately 5'6", 160 pounds, was wearing blue pants, a white t-shirt and a "Raiders" cap. We approached the group, and spoke with them. I filled out a field interview

card with Officer Schaeffer on one member of the group, who identified himself as Rafael Ruiz. I also filled out a field interview card on three (3) other members of the group. Officer Weidner filled out a field interview card on the fifth member of the group, in my presence. All five (5) of them were dressed in a manner consistent with Sureno gang members. Four (4) of the five (5) wore articles of "Raiders" clothing: caps and t-shirts, along with the colors blue, black and white. All five (5) members of the group admitted gang membership in "VST." Copies of the field interview cards I completed and the field interview card that Officer Weidner filled out in my presence are attached as Exhibit "D." I have blacked out identifying information on four (4) of the five (5) individuals, as it is my understanding that they are not parties to the pending gang abatement action. Otherwise, Exhibit "D" is a true and correct copy of the field interview cards we completed. I asked the group if they would like to pose for a picture. They said they would. I took two photos, keeping one for myself and giving one to them. A true and correct copy of the group photo I took is attached as Exhibit "E." Rafael Ruiz is pictured as the second individual on the left side of the group photo. In the group photo, the members are displaying the numeric Sureno symbols, "3," and "13," with their fingers. I also took a photo of Rafael Ruiz, a true and correct copy of which is attached as Exhibit "F." In the photo, Rafael Ruiz is also displaying the Sureno gang sign, by holding up 3 fingers.

10. On October 7, 1992, at around 2:00 p.m., I was on foot patrol in Rocksprings when I saw a group of five (5) young, hispanic male [sic] hanging around the area of Nordale Avenue and Rocksprings Drive. I recognized one

of them as Miguel Lopez. I recognized all but one of the other members of the group. I spoke with the individual I did not recognize. He identified himself as Martin Hassan Davila. He said that he did not live in the immediate area. During the course of our conversation, I asked him if he belonged to a gang. He told me that he was a member of "VST." I filled out a field interview card for him, documenting this information a true and correct copy of which is attached as Exhibit "G." I also took two (2) photos of the group, keeping one for myself and giving one to them, a true copy of which is attached as Exhibit "H." In the photo, Martin Hassan Davila is pictured on the far left. Miguel Lopez is pictured on the far right. The members of the group are flashing gang hand signs showing the Sureno symbols "3," and "13," with their fingers.

11. On October 28, 1992, at around 12:45 p.m., I was on foot patrol in "Rocksprings." I encountered and spoke with a young, hispanic male who was hanging around the area of 649 Nordale Avenue. He identified himself to me as Jose Luis Bravo. He said that he did not live in the "Rocksprings" area. During the course of our conversation, I asked him if he belonged to a gang. He responded that he belonged to the "VST" gang. I filled out a field interview card for him, documenting this information, a true and correct copy of which is attached as Exhibit "I."

12. On October 31, 1992, at around 12:30 p.m., I was on foot patrol in "Rocksprings" when a car with two (2) young, hispanic women drove up to the address at 649 Nordale Avenue. They waited outside that location, and they started up a conversation with me. One of the young women identified herself to me as Blanca Gonzalez. They told me that they did not live in "Rocksprings." I asked

them if they belonged to a gang. They both responded that they were members of the "VSL" gang. I filled out a field interview card on both of them, documenting this information, copies of which are attached as Exhibit "J." I have blacked out identifying information on one of the females, as it is my understanding that she is not a party to the pending gang abatement hearing. Otherwise, Exhibit "J" is a true and correct copy of the field interview cards I completed.

I declare under penalty of perjury that the foregoing is true and correct. As to those matters alleged on information and belief, I am informed and believe them to be true and correct. This declaration was executed on this 23 day of June, 1993, at San Jose, California.

/s/ Dave Storton 2454
DAVE STORTON

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CLARA

PEOPLE OF THE STATE OF CALIFORNIA, ex rel., CITY ATTORNEY OF THE CITY OF SAN JOSE, Plaintiffs, vs. CARLOS ACUNA, et al., Defendants.	No. 729322 DECLARATION OF PAUL SPAGNOLI

I, PAUL SPAGNOLI, declare as follows:

1. I have been employed as a San Jose Police Officer for the past one and one-half (1-1/2) years. Previous to this, I was a Police Officer for the City of Pacifica. I was assigned to daytime patrol duties in District "Lincoln" for approximately eight (8) months, from July 1992 through March 1993. I have received formal training on the subject of criminal street gangs at the Police Academy and at the

San Jose Police Department's yearly Continuing Professional Training (CPT). I have also attended several training programs on the subject of criminal street gangs, offered by the Department's Violent Crimes Unit (VCU), as well as the Department's Intelligence Unit, and one advanced training program for law enforcement offered at the College of San Mateo.

2. During the period of time that I was assigned to patrol in District "Lincoln", I responded frequently to the "Rocksprings" area, due to the high level of drug and gang related crime in that area. Drug dealing in that neighborhood was commonly know to be gang related. I would estimate, based upon my personal experience having worked patrol in that area for an eight (8) month period, that at that time, drug dealing was about 75% gang related.

3. On October 13, 1992, at 11:55 a.m., I was working a foot patrol in "Rocksprings" in the area of Nordale Avenue and Welch Avenue. I saw three (3) young males, one hispanic, one white and one black, conversing on the sidewalk. The black male appeared to be somewhat older than the white and the hispanic male. It appeared that some transaction was taking place. The hispanic male handed something to the white male, who then handed it to the black male. The hispanic male and the white male stayed at their location, and the black male walked away from them, toward my location. I came forward from where I had been standing, and contacted the black male. I made conversation with him. He appeared nervous, and I asked him why. He said, "because I just bought some weed." I asked him where it was. He took it out of his left front pants pocket and he handed it to me. I asked him

who he had bought it from, and how much he had paid. He said, "$10.00" and pointed out the hispanic male and the white male that I had observed him with earlier. I had another officer make contact with them. The hispanic male was identified as Miguel Moreno, birthdate of 7-20-75. He was found to have exactly $10.00 in his possession. I determined that Miguel Moreno was a truant from high school at the time that this transaction took place.

I declare under penalty of perjury that the foregoing is true and correct. As to those matters alleged on information and belief, I am informed and believe them to be true and correct. This declaration was executed on this 24 day of June, 1993, at San Jose, California.

/s/ Paul Spagnoli #2924
PAUL SPAGNOLI

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

PEOPLE OF THE STATE, OF CALIFORNIA et al., Plaintiffs, v. CARLOS ACUNA, et al. Defendants.	Case No. 729322 DECLARATION OF DECLARANT "A

I, MIGUEL MORENO, hereby declare as follows:

1. I am 17 years old. I live and work in Tulare, California.

2. I will be 18 in July 1993. My girlfriend and I had a baby girl a few weeks ago. We plan to be married, and I am working so that I can take care of my family. My girlfriend and baby live on Nordale Avenue in the Rocksprings area. I spend as much time as I can with them on the weekends when I am not working. My girlfriend was born in San Jose.

3. My cousin and his family also live on Nordale Avenue in the Rocksprings area. My cousin manages the apartment building that he lives in. A few weeks ago I was walking near my cousin's house with his eleven year old son and his son's school friends when a policeman stopped us. He called me a "Fucking piece of shit" in front of my cousin and his friends, and threatened to take me to juvenile hall if I didn't cooperate with him. I told him my name and address and he let me go.

4. In August 1992 I was stopped by a policeman when I was walking down the street on Nordale. I was wearing a shirt and cap with "Raiders" on them, and the police officer told me that Raiders clothes were gang clothes. I was only wearing these clothes because I am a Raiders fan, and that is what I told the officer. The policeman took my picture without asking me, and said it was for his "collection." He asked me if I was in a gang and I told him I was not. I am not in a gang, and have never told anyone that I was.

5. I first heard about VST and VSL in 1991. From what I have heard, there are no leaders of either gang. From what I can tell, when members of the gangs sell drugs, they do it for themselves. They don't share whatever money they make with the gang, and probably the other gang members don't even know they are selling drugs.

6. I know four of the other defendants in this lawsuit from school.

7. I was arrested in October 1992 at the Happy Hollow Store near the Rocksprings area and charged with selling marijuana. I spent one day in juvenile hal, but the charges were dropped.

8. Since I was arrested, I have seen the officer who arrested me in the Rocksprings area again, and we talk and are friends.

9. My father is very strict. He would not allow me to be involved in any gang activity. Now I am afraid to even walk on the street, or wear my Raiders clothes because the police might stop me again, and I don't vant to get into trouble.

10. I have personal knowledge of the foregoing facts and if called as a witness I could and would testify to the truth of these facts.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in San Jose, California on May 9, 1993.

Dated: 5/9/93 /s/ Miguel Moreno
MIGUEL MORENO, JR.

Supreme Court, U.S.
FILED
MAY 30 1997
CLERK

No. 96-1744

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BLANCA GONZALEZ and MIGUEL MORENO,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA, ex rel.,
JOAN R. GALLO, City Attorney of the City of San Jose,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

---

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The three (3) questions presented by Petitioners are misleading in that they fail to specify that the prohibitions contained in the preliminary injunction issued to abate the public nuisance caused by the VSL/VST criminal street gangs apply only within the confines of a four (4) block neighborhood known as Rocksprings.

PARTIES

Blanca Gonzalez and Miguel Moreno are the only two (2) of the original eleven (11) appellants who challenged the preliminary injunction to join in the Petition for a Writ of Certiorari.

Petitioners incorrectly identify the Respondent as Joan R. Gallo, City Attorney of San Jose, California. The correct Respondent is the People of the State of California, ex rel. Joan R. Gallo, City Attorney of San Jose, California.

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On Petition for a Writ of Certiorari to the Supreme Court of California

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BRIEF OF RESPONDENT IN OPPOSITION

This case simply involves the use of an injunction to abate a public nuisance in a manner that is completely consistent with constitutional principles.

STATEMENT OF THE CASE

A. Proceedings To Abate The Public Nuisance.

On February 26, 1993, the Respondent filed this civil action in superior court seeking an injunction to abate the public nuisance caused by the VSL/VST criminal street gangs within a four (4)-block neighborhood known as Rocksprings. The public nuisance created by the VSL/VST criminal street gang members within Rocksprings is succinctly described in the opinion of the California Supreme Court as follows:

> The four-square-block neighborhood, claimed as the turf of a gang variously known as Varrio Sureno Town, Varrio Sureno Treces (VST), or Varrio Sureno Locos (VSL), is an occupied territory. Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency—openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents' cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire echoing in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. The community has become a staging area for gang-related violence and a dumping ground for the weapons and instrumentalities of crime once the deed is done. Area residents have had their garages used as urinals; their homes commandeered as escape routes; their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen canvas of gang graffiti.
>
> The people of this community are prisoners in their own homes. Violence and the threat of violence are constant. Residents remain indoors, especially at night. They do not allow their children to play outside. Strangers wearing the wrong color clothing are at risk. Relatives and friends refuse to visit. The laundry rooms, the trash dumpsters, the residents' vehicles, and their parking spaces are used to deal and stash drugs. Verbal harassment, physical intimidation, threats of retaliation, and retaliation are the likely fate of anyone who complains of the gang's illegal activities or tells police where drugs may be hidden.

(Petitioners' App. 1-2; *also see,* Petitioners' App. 34-35.)

The characteristics of Rocksprings made the neighborhood attractive for the VSL/VST criminal street gang members, who had lived and worked elsewhere, to claim it as their turf. It is isolated from other residential neighborhoods—having only two (2) streets for ingress and egress—and consists primarily of low income apartment buildings. (*See*, State Court App. 51, 82, 686-689.) This, along with the protective shield provided by the VSL/VST criminal street gangs, enabled these gangs to flourish in Rocksprings despite intense police enforcement efforts. (*See*, State Court App. 33, 45-46, 58, 63, 593-594, 608, 620, 686, 689-690, 699.)

To abate the public nuisance caused by the VSL/VST criminal street gangs in Rocksprings, the superior court ultimately issued a preliminary injunction against eleven (11) specifically named gang members, including Petitioners. (Petitioners' App. 3). The preliminary injunction contains twenty-four (24) provisions. Although Petitioners suggest otherwise, **the preliminary injunction regulates conduct only within the (4) blocks referred to as Rocksprings.**

The eleven (11) gang members appealled the issuance of the preliminary injunction on numerous grounds to the court of appeal. The court of appeal upheld nine (9) provisions of the preliminary injunction and struck the remaining provisions, including paragraphs (a) and (k), the provisions now being challenged by Petitioners. (Petitioners' App. 91-93.) It also dismissed Petitioner Blanca Gonzalez. (Petitioners' App. 112-113.) The opinion of the California Supreme Court accurately describes the basis of the decision of the court of appeal. (Petitioners' App. 4.) In the interests of brevity, Respondent respectfully refers this Court to that discussion.

Respondent filed a petition for review with the California Supreme Court, seeking review only of provisions (a) and (k) of the preliminary injunction and the dismissal of

Petitioner Blanca Gonzalez. The California Supreme Court granted review of these issues, and its decision, with regard to the provisions of the preliminary injunction, is limited to paragraphs (a) and (k). (Petitioners' App. 4, 44.) The merits of the other twenty-two (22) provisions of the preliminary injunction were not at issue before the California Supreme Court. Thus, Petitioners' implication of the start of their petition that the decision of the California Supreme Court upheld all twenty-four (24) provisions of the preliminary injunction is simply wrong. (See, Petition, p. 3.)

B. Correcting Misrepresentations Of The Record.

Petitioners badly misrepresent the record by asserting that the "core" evidence forming the basis of Respondent's abatement action is the declaration of a single police officer. (Petition, pp. 5-6.) As the California Supreme Court correctly noted in its opinion, Respondent filed a total of forty-eight (48) declarations in support of its abatement action. (Petitioners' App. 1; *also see,* State Court App. 28-33, 39-88, 558-795.) Approximately forty-one (41) of the declarations were by City of San Jose police officers, most of whom had extensive training regarding gang issues and were personally familiar with Rocksprings because they were currently working in that neighborhood or had previously been assigned to it. (*Ibid.*) The remaining seven (7) declarations, which were filed under seal, were by residents of Rocksprings.

Petitioners also misrepresent the record by asserting that an individual would be identified as a VSL/VST criminal street gang member if he/she was observed by a police officer on just one (1) occasion wearing clothing indicative of such gang membership. (Petition, pp. 6-7.) Petitioners have not, and can not, identify one (1) individual named as a defendant in this case who the superior court determined to be a VSL/VST criminal street gang member based solely upon style of dress, let alone style of dress

on one (1) occasion. Respondent established gang membership at this preliminary stage in the proceedings [1] by submitting evidence of multiple indica of gang membership. This evidence included admissions, tattoos, gang style of dress, whether individuals were associating with other admitted gang members, photos, knowledge of gang hand signs, location of the contact with police, and whether other individuals had identified the defendant as a gang member. (*See,* State Court App. 558-789.)

The evidence that Petitioners are VSL/VST criminal street gang members involved much more than dress. The evidence against Petitioner Blanca Gonzalez includes the fact that on two (2) separate occasions, within ten (10) months of the date upon which Respondent filed this legal action, she admitted gang membership to two (2) different police officers. (State Court App. 635-642, 757-779.) One (1) of these admissions occurred while she was "hanging out" in Rocksprings. (State Court App. 757-779.) On both occasions, the admissions were supported by the fact that she was with others who also admitted gang membership [2]; she, along with the persons she was with, were dressed in a manner consistent with membership in the VSL/VST criminal street gangs; and she was in areas frequented by these gangs. (State Court App. 635-642, 757-779.)

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[1] Importantly, Petitioners are challenging a preliminary injunction, which is customarily granted on the basis of procedures that are less formal and evidence that is less complete than a trial on the merits . (*See, University of Texas v. Camenisch,* 451 U.S. 390, 395-396 (1981).) Accordingly, the determination made by the superior court with regard to membership merely reflects its conclusion, based upon the record before it at the time of its ruling, that Respondent is likely to prevail on the merits at trial. It is not a final adjudication of the merits. (*See, ibid.*)

[2] Petitioners fail to quote the portion of the Declaration of Police Officer Michael Lloyd indicating that the individuals Petitioner Blanca Gonzalez was with also admitted gang membership. (*See,* Petition, p. 8; *also see,* State Court App. 635-642.)

Similarly, the evidence against Petitioner Miguel Moreno also includes admission of gang membership to a police officer within six (6) months of the time this lawsuit was filed. (State Court App. 757-779.) Petitioner Miguel Moreno made this admission while loitering in Rocksprings, where he did not live and which, as already discussed, was the "turf" of the VSL/VST criminal street gangs. (*Ibid.*) Further indicia of gang membership is the fact that he was observed in Rocksprings selling illegal drugs—one of the primary activities engaged in by VSL/VST criminal street gang members in Rocksprings. (State Court App. 754-756.)

REASONS FOR DENYING THE WRIT

It is beyond question that the courts have the authority to issue injunctions to abate public nuisances. (*See, e.g., United Steel Workers v. United States*, 361 U.S. 44, 60-61 (1959), *Re Debs*, 158 U.S. 564, 587 (1884).) Moreover, this Court has repeatedly recognized in a variety of contexts the strong government interest in ensuring public safety and order, promoting the free flow of traffic on public streets and sidewalks, protecting the property rights of citizens and protecting residential privacy. (*See, Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 767-768 (1994).) And, Petitioners can not establish a conflict between this case and any other case, for no court has held that public nuisance abatement actions can not be used to abate a public nuisance caused by street gangs in a neighborhood that they have taken over as their turf.

What Petitioners are thus left to argue is that this Court should review the constitutionality of two (2) provisions of the preliminary injunction and that neither of these provisions should be binding upon them. However, the California Supreme Court resolved these issues based upon firmly established constitutional principles, including those set forth by this Court in *Madsen, supra,* 512 U.S. 753, and *Schenk v. Pro-Choice Network,* 519 U.S.—— [117

S. Ct. 855] (1997). Further review is therefore unwarranted.

I. PARAGRAPH (a) IS CONSISTENT WITH *MADSEN*.

Petitioners' attack on paragraph (a) as a "ban on public association in Rocksprings" greatly overstates the reach of this provision. (*See*, Petition, p. 19.) Paragraph (a) is extremely narrow in that it only prohibits the specifically named gang members from congregating in *public* within Rocksprings with other gang members. It does not prevent the named gang members from freely entering and leaving the neighborhood. The named gang members are free to walk the streets and sidewalks of Rocksprings alone or with other non-VSL/VST criminal street gang members. They are free to meet with others, including other VSL/VST criminal street gang members, in homes or apartments within Rocksprings or any place outside of Rocksprings. Thus, despite Petitioners' suggestion to the contrary, paragraph (a) does not at all restrict the ability of Miguel Moreno to meet with his girlfriend, baby and cousin, even if they, in fact, live in Rocksprings. (*See*, Petition, p. 19.) As the California Supreme Court correctly concluded, the purpose of paragraph (a) is simply and clearly:

> . . . to ensure that, within the circumscribed area of Rocksprings, gang members have no opportunity to combine. . . . [¶] . . . It is the threat of *collective* conduct by gang members loitering in a specific and narrowly described neighborhood that the provision is sensibly intended to forestall.

(Italics in original.) (Petitioners' App. 35-36.)

Despite the narrow reach of paragraph (a), Petitioners contend that this provision is invalid because "[u]nder standards set forth in *Madsen* this ban on public association in Rocksprings is more than 'necessary to serve a significant governmental interest.' " (Petition, p. 19, *quoting*

Madsen, supra, 512 U.S. at 765). Assuming for the sake of argument that this is the applicable standard,[3] paragraph (a) is valid because it is no broader than necessary to serve the significant government interest of abating the public nuisance caused by the VSL/VST criminal street gangs in Rocksprings. (Petitioners' App. 33-38.)

Prophylactic measures, such as paragraph (a), are common in injunctions issued to deal with nuisances. For example, this Court recently upheld just such a measure in *Schenk, supra,* 519 U.S. —— [117 S. Ct. 855]. In *Schenk*, this Court upheld a provision of an injunction creating a "fixed buffer zone" in order to ensure that abortion protesters did not prevent access to the subject clinic. (519 U.S. at —— [117 S. Ct. at 866].) The protestors challenged the provision, arguing the other provisions of the injunction that were not challenged, such as those prohibiting trespassing, excessive noise and "blocking, impeding or obstructing access," were sufficient to ensure access. (519 U.S. at —— [117 S. Ct. at 869].) They asserted that the "fixed buffer zone," therefore, simply acted to ban peaceful, nonobstructive demonstrations on public sidewalks and rights of way. (*Ibid.*) This Court rejected the protestors' argument, holding that the fixed buffer zone was an appropriate "prophylactic measure" in light of the record. (*Ibid.*)

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[3] In *Madsen*, this Court held that in evaluating an injunction restricting First Amendment speech, the injunction could "burden no more speech than necessary to serve a significant interest." (512 U.S. at 765-766.) Petitioners' reference to this portion of *Madsen* simply ignores the fact that this test is only applicable to injunctions burdening speech. As the California Supreme Court correctly concluded, the evidence in this case does not demonstrate that the VSL/VST criminal street gangs were engaged in any Constitutionally protected expressive or speech-related activities within Rocksprings. (Petitioners' App. 36.) Thus, application of this test to paragraph (a) applies a stricter standard than necessary. Nevertheless, as discussed above, paragraph (a) clearly meets this more stringent standard.

Petitioners' contention that paragraph (a) improperly inhibits a gang member's "right to use the sidewalks and streets as protestors . . ." suffers several flaws. (*See, Petition*, p. 19.) As discussed above, paragraph (a) does not completely prohibit the use of sidewalks and streets in Rocksprings by named gang members. Moreover, nothing in the record establishes that the VSL/VST gang members were using the streets and sidewalks within Rocksprings "as protestors." To the contrary, as the California Supreme Court correctly concluded:

> To judge from the evidence placed before the superior court, the gangs appear to have had no constitutionally protected or even lawful goals within the limited territory of Rocksprings. So far as the record before the trial court shows, the gangs and their members engaged in no expressive or speech-related activities which were not either criminally or civilly unlawful or inextricably intertwined with unlawful conduct.

(Petitioners' App. 36.)

Furthermore, this Court has upheld provisions of injunctions that limit the right to use sidewalks and streets even in the protest context. (*See, e.g., Madsen, supra*, 512 U.S. 753 [upholding fixed buffer zone that prevented protesters from entering any portion of the public right-of-way within 36 feet of the property line of the clinic], *Schenk, supra*, 519 U.S. at —— [117 S. Ct. 868-869] [upholding fixed buffer zone that included public sidewalks and rights of way].)

The cases cited by Petitioners are inapposite. None of the cases hold that an injunction issued to abate a nuisance can not contain provisions restricting the use of public streets and sidewalks. (*See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) [striking an anti-vagrancy statute on vagueness grounds], *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) [striking an ordinance prohibiting three (3) or more persons from

gathering on sidewalks and conducting themselves in a manner annoying to others], *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965) [striking a statute that could be interpreted to criminalize the mere refusal to move from a sidewalk after being requested to do so by a police officer], *Waters v. Berry*, 711 F. Supp. 1125 (D.D.C. 1989) [upholding a challenge to a juvenile curfew ordinance].) Unlike these cases, paragraph (a) is an appropriate "prophylactic measure" based on the record in this case and is consistent with the constitutional principles announced in *Madsen* and *Schenk*.[4]

II. NEITHER PARAGRAPHS (a) NOR (k) ARE VAGUE.

Petitioners' assertion that this Court should grant review of paragraphs (a) and (k) because these provisions are unconstitutionally vague is without merit. The "vagueness" doctrine raises a different issue than whether or not a provision of an injunction is properly tailored to meet the requisite government interest. A "vagueness" challenge focuses on whether the words of the injunction are sufficiently definite to give persons of ordinary intelligence adequate notice of the proscribed conduct. (*See, Schenk, supra*, 519 U.S. at—— [117 S. Ct. at 869-870] [holding that the term "demonstrating" is not vague when

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[4] In their statement of the case, Petitioners misrepresent that the California Supreme Court upheld paragraph (a) on the ground that "there is no right to associate with fellow gang members. . . ." (Petition, pp. 11-12.) The rationale of the California Supreme Court was substantially more limited, concluding only that *within Rocksprings* the VSL/VST criminal street gang members did not have a constitutionally protected right to association in public view. (Petitioners' App. 18-22.) In reaching this conclusion, the California Supreme Court succinctly stated:

> Freedom of association, in the sense protected by the First Amendment, "does not extend to joining with others for the purpose of depriving third parties of their lawful rights."

(Petitioners' App. 21, *quoting Madsen, supra*, 512 U.S. at 776.)

the injunction is read as a whole]; *also see, Roth v. United States,* 354 U.S. 476, 491 (1957).) In evaluating "vagueness" challenges this Court has said that "[t]he particular context is all important." (*American Communications Asso. v. Douds,* 339 U.S. 382, 412 (1950).)

A. Paragraph (a) Gives Adequate Notice.

Petitioners assert that the prohibition in paragraph (a) against gathering "with any other known 'VST' . . . or 'VSL' member" is unconstitutionally vague because it is unclear who has to "know." (*See,* Petition, pp. 20-21.) However, as the California Supreme Court properly concluded in response to this very same argument, Respondent must establish the defendant's own knowledge of his associate's gang membership to meet its burden of proving conduct in violation of this provision of the preliminary injunction. (Petitioners' App. 30.) Moreover, in upholding the provision, the California Supreme Court stated:

> . . . we think the element of knowledge is fairly implied in the decree. To the extent that it might not be, we are confident that the trial court will . . . impose such a limiting construction on paragraph (a) by inserting a knowledge requirement should an attempt be made to enforce that paragraph of the injunction. With this minor emendation, the text of provision (a) passes scrutiny under the vagueness doctrine.

(Petitioners' App. 30.) Throughout these appellate proceedings, Respondent has taken the position on this issue adopted by the California Supreme Court. (*See,* Respondent's Brief in the Court of Appeal, p. 73; Letter-Brief of Respondent to the Court of Appeal, p. 3, n.1; Petition for Review to the California Supreme Court, p. 12, n.3; Respondent's Opening Brief on the Merits to the California Supreme Court, p. 35, n.21; Respondent's Reply Brief on the Merits to the California Supreme Court, p. 23.)

Even as correctly interpreted, Petitioners assert paragraph (a) is unconstitutionally vague because it invites arbitrary enforcement. (Petition, p. 21.) This argument is based on the assertion that paragraph (a) empowers police officers to arrest a defendant if the officer "thinks" or "believes" the defendant is in Rocksprings with an individual the defendant knows to be a VSL/VST criminal street gang member. (*Ibid.*) However, paragraph (a) is no different than the multitude of other prohibitory statutes and injunctions containing an "intent" element. Moreover, paragraph (a) does not alter the basic requirement that a police officer needs "probable cause," not a mere "belief," to make an arrest for violation of a statute or injunction. Thus, a police officer must have "probable cause" to believe that a defendant "knows" that the other individual is a gang member in order to make an arrest for a violation of paragraph (a).

Petitioners' reliance on *Kolender v. Lawson,* 461 U.S. 352 (1983) is misplaced. In *Kolender,* this Court held that a criminal statute requiring persons who loiter to provide "credible and reliable" identification when requested by a police officer was unconstitutionally vague. This conclusion was based on the fact that the statute failed to set forth with sufficient particularity what a suspect must do in order to satisfy this requirement, leaving individual police officers on the beat to decide whether the identification presented was "credible and reliable." (*Id.* at 360-361.) Thus, in *Kolender* it was unclear what a police officer needed probable cause of before making an arrest. On the other hand, it is clear under paragraph (a) that a police officer needs probable cause to believe defendant has the requisite knowledge before making an arrest for a violation of this provision. Petitioners' paragraph (a) vagueness challenge is, therefore, without merit.

B. Paragraph (k) Gives Adequate Notice.

Petitioners assert that the terms "confronting," "intimidating" and "annoying" in paragraph (k) are unconstitutionally vague based upon this Court's decision in *Coates, supra,* 402 U.S. 611.[5] (*See*, Petition pp. 22-23.) In *Coates,* this Court struck an ordinance, in part, on the ground that the use of the word "annoying" was vague because "no standard of conduct is specified at all." (402 U.S. at 614.)

Unlike *Coates*, the preliminary injunction at issue here clearly sets forth standards of conduct for the terms "confronting," "intimidating" and "annoying" when these words are considered in context. (*See*, Petitioners' App. 31-32.) In response to this same argument, the California Supreme Court correctly stated:

> . . . the declarations filed by the City in support of preliminary relief leave little doubt as to what kind of conduct the decree seeks to enjoin. One Rocksprings resident recounted an incident in which gang members had threatened to cut out the tongue of her nine-year-old daughter if she talked to the police; she stated that other residents had been threatened as well. Another resident reported her neighbor's property had been vandalized and the resident threatened after complaining to police that gang members had urinated in her garage. A police officer declared Rocksprings residents had told him gang members confront and threaten them with physical violence when asked to leave residential property. Others refused to furnish declarations, fearing for their lives if any gang member should discover their identities.

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[5] The discussion with respect to the "knowledge" requirement of provision (a) is also applicable to paragraph (k). As with paragraph (a), Respondent has throughout these proceedings conceded that defendants had to have the "knowledge." (*See*, Petition for Review to the California Supreme Court, p. 20, n.65; Respondent's Opening Brief on the Merits to the California Supreme Court, p. 47, n.24.)

(*Ibid.*) Indeed, words such as those challenged by Petitioners are commonly used in injunctions. (*See, e.g., Madsen, supra,* 512 U.S. at 760-761, 775 [upholding against a vagueness challenge an injunction prohibiting "intimidating, harassing, touching, pushing, shoving, crowding, or assaulting persons entering or leaving' "], *Allred v. Shawley,* 232 Cal.App.3d 1489 (1991) [upholding an injunction that, in part, enjoined abortion protesters from entering a parking area to "[p]hysically approach, confront, walk nearby, or follow . . ."], California Code of Civil Procedure § 527.6 [authorizing an injunction prohibiting harassment and defining harassment as conduct that "alarms, annoys, or harasses the person. . . ."].) Accordingly, Petitioners' paragraph (k) vagueness challenge is without merit.

III. AN INJUNCTION CAN BIND THE MEMBERS OF AN ORGANIZATION CAUSING A PUBLIC NUISANCE.

Notwithstanding Petitioners' assertions to the contrary, it is a common and well-established practice for courts to issue injunctions regulating conduct that are binding upon persons based on "association" with an organization, even one exercising First Amendment rights. Without question, an injunction can run to classes of persons through whom the enjoined organization may act, such as agents, servants, employees, aiders, and abettors, even though they are not parties to the action. (*See, e.g., Regal Knitwear Co. v. National Labor Relations Board,* 324 U.S. 9, 13-16 (1944), *In re Lennon,* 166 U.S. 548, 554 (1897), *Berger v. Superior Court,* 175 Cal. 719, 721 (1917).) For example, in *Madsen* this Court upheld certain provisions of an injunction directed at:

> Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, *members,* employees and servants . . . and all persons acting in concert or participation with them, or on their behalf.

(Emphasis added.) (512 U.S. at 759, fn. 1; *also see, Schenk, supra,* 519 U.S. at —— [117 S. Ct. at 859, 862, n.3] [upholding a portion of an injunction against defendants Operation Rescue, Project Rescue Western New York, and Project Life of Rochester, and "the officers, directors, agents, and representatives of defendants, and all other persons whomsoever, known or unknown, acting in their behalf or in concert with them, and receiving actual or constructive notice of this Order . . ."], *Milk Wagon Drivers Union, supra,* 312 U.S. 287 [injunction prohibiting a labor union from engaging in any picketing where peaceful picketing was enmeshed with violent conduct must necessarily have bound the union members].)

As the California Supreme Court suggested, although the issue was not directly before them, and Petitioners assume to be true, Respondent could have obtained a preliminary injunction against the VSL/VST criminal street gangs as organizations. (Petitioners' App. 42-43; Petition, p. 25.) Had Respondent done so, the preliminary injunction unquestionably could have been worded to bind the defendant VSL/VST criminal street gang members, including Petitioners. This would have been true even if the defendants were not named as parties in the abatement action, so long as they had notice of the preliminary injunction.

It would be an absurd result to conclude that Respondent could have obtained an injunction binding these gang members by naming the VSL/VST criminal street gangs as defendants but can not do so by specifically naming the individual gang members. (*See,* Petitioners' App. 42-43.) This is especially true given that, by proceeding in the manner in which it did, Respondent provided greater due process than necessary by naming each of the persons to be subject to the injunction as a defendant, serving each of the with the lawsuit, and giving each of them the opportunity to appear in court to challenge the allegations of the lawsuit.

Petitioners' assertion that members of an organization creating a public nusiance can be bound by an injunction only based upon evidence demonstrating they had a specific intent to accomplish the public nuisance is illogical. (Petition, pp. 25-29.) If Petitioners' assertion were correct, an injunction issued against organizations, such as those at issue in *Madsen,* would be ineffective. Organizations can, of course, only act through their members.

Moreover, none of the cases cited by Petitioners stands for the proposition that members of an organization creating a public nuisance can not be bound by an injunction abating the nuisance. This is not a case were Respondent seeks to impose monetary damages on the defendants. (*See, NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) [holding that individual members of the NAACP could not be held *liable* for business losses suffered by plaintiff merchants over the seven-year duration of a civil rights boycott during which only sporadic violence occurred].) Nor is this a case where Respondent seeks to impose criminal sanctions based upon Petitioners' membership in the gangs.[6] (*See, Scales v. United States,* 367 U.S. 203 (1961) [reversing a conviction under a statute that made it a felony for a person to be a member of the Communist Party], *Mitchell v. Prunty*, 107 F.3d 1337 (9th Cir. 1997), *amended on denial of rehearing* —— F.3d ——, [stating that the defendant could not be convicted of murder merely based on association with gang absent evidence of aiding and abetting in the murder].) Nor is this a case where Respondent seeks to withhold recognition of a political organization. (*See, Healy v. James,* 408 U.S. 169 (1972) [state college improperly withheld recognition to Students for a Democratic Society because of its affiliation with a national organization involved in sporadic disruptive and violent campus activity].) Furthermore, unlike the organizations at issue in *Claiborne Hard-*

[6] For this reason, Petitioners' "Jaycees" hypothetical is also inopposite. (Petition, p. 28.)

ware, Scales and *Healy*, the record in this case does not demonstrate that the VSL/VST criminal street gangs engaged in any protected First Amendment activities within Rocksprings.

CONCLUSION

For the above reasons, Respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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